In the Matter of:

Diana R.Williams,
Complainant

v.

Baltimore City Public School,
Respondent

Date Issued: 11-30-00

Case No.: 2000-CAA-15

Appearances

Diana R.Williams, Pro Se

Brian K. Williams, Esq.
For the Respondent

RECOMMENDED DECISION AND ORDER

This proceeding arises under Section 322(a)(1-3) of the Clean Air Act, 42 U.S.C. § 7622; Section 110(a) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9610; Section 507(a) of the Federal Water Pollution Control Act, 33 U.S.C. § 1367; Section 1450(i)(1)(A-C) of the Safe Drinking Water Act, 42 U.S.C. § 300j-9; Section 7001(a) of the Solid Waste Disposal Act, 42 U.S.C. § 6971; and Section 23(a)(1-3) of the Toxic Substances Control Act, 15 U.S.C. 2622.

The employee protection provisions of each of these Acts prohibit an employer from discharging or otherwise discriminating against any employee because the employee engages in activities that are subject to protection under the Act.

On or about December 14, 1999, the Claimant filed a claim with the United States Department of Labor against her former employer, the Baltimore City Public School System, Respondent, for unlawful discharge and discrimination in violation of the above listed statutes. After investigating the Claimant's complaint, the Department of Labor Occupational Safety and Health Administration found on June 9, 2000, that the Claimant was a protected employee engaging in a protected activity within the scope of the Acts, and that discrimination as defined and prohibited by the statutes was a factor in the actions that comprised the complaint. The Respondent appealed this finding by telefaxing an appeal,

dated June 16, 2000, which was also delivered by mail on June 19, 2000 (ALJ 3).[1]

On August 1, 2000, the Claimant filed a Motion for Summary Judgment (ALJ 9). On August 11, 2000, the Respondent filed its response, as well as a cross-motion for summary judgment (ALJ 10). I denied both motions, finding that they were untimely, and that there were many genuine issues of fact raised by the parties' pleadings, and thus summary judgment was not appropriate (TR 7-8).

A formal hearing was conducted before me on August 17, 18, and 23, 2000, in Baltimore, Maryland. At the hearing, the Claimant appeared *pro se*; the Respondent was represented by counsel. Both parties presented evidence and examined witnesses. After the close of the hearing, both parties were provided the opportunity to submit post-hearing briefs. The Respondent's brief was received on October 11, 2000; the Claimant's brief was received on October 17, 2000.

The record consists of the hearing transcript (TR); Claimant's Exhibits 1-6, 8-14, 30, 32-34, 82, 84-97, 109-112, 131-141, 150-169, 200-207, 209-238, 240-291, 293, 299, and 301 (CX); Respondent's Exhibits 19, 21, 22, and 31 (RX); and ALJ Exhibits 1 to 10 (ALJX). At the hearing, I reserved a ruling on the admissibility of the entirety of CX 7A and 7B, which are videotapes of, *inter alia*, various news reports, as well as footage taken of the inside of several school buildings. These exhibits are hereby admitted into the record.

I also note that on August 26, 1999, the parties participated in a hearing on the issue of the Claimant's dismissal, before a hearing examiner hired by the Baltimore City Board of School Commissioners, who made a recommendation to the Board. At this hearing, the Claimant and the Respondent presented evidence and examined witnesses. The transcript of this hearing was submitted by the Claimant as CX 281, and testimony from this hearing, referred to as the "dismissal hearing," is cited frequently in this opinion. In addition, the exhibits submitted at this hearing by the Claimant and the Respondent were submitted by the Claimant as CX 278 and CX 279.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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[1] I note that the Respondent's attitude toward these proceedings has been rather cavalier. The Respondent did not participate at all in the investigation by the Department of Labor, electing to wait until the matter was before the Office of Administrative Law Judges. Once the matter was before the Office of Administrative Law Judges, the Respondent did not bother to respond to the Claimant's interrogatories, and proffered no reason at the hearing for its failure to do so. (The Claimant did not file a motion to compel, and elected to go forward with the hearing rather than postpone it for the Respondent to file its answers.) The Respondent ignored the subpoenas that were properly served by the Claimant on Respondent's employees, and only produced witnesses pursuant to my direction at the hearing.

Background

As the Claimant's complaint involves allegations of lead in the drinking water at schools in the Baltimore City Public School System (System), the following history is useful in placing the facts in context. In 1992 and 1993, as required by law, all of the schools in the Baltimore City Public School System were tested for potential lead hazards, by an independent contractor commissioned by the school system. Drinking fountains that showed unacceptable levels of lead were tested a second time, after they were flushed. If they passed on the second test, they were required to be flushed each morning to clear any buildup of lead in the pipes. If they failed, they were to be turned off. As part of this project, Southeast Middle School (Southeast), along with about 35 other schools, including Farimount-Harford (Farimount) were identified as schools with more than 20 parts per billion of lead before the water was flushed. All of the public schools in Baltimore that were so identified complied with the EPA's requirements either to flush the fountains in the morning, or turn them off completely. Until the schools could be renovated, the long-term temporary solution was to provide bottled water at stations in the school. The contractor's report was posted in the schools, identifying what had been done, which fountains had been turned off, and which needed to be flushed (TR 666-674; CX 279).

In the summer of 1996, an extended, phased-in renovation project began at Farimount. The building remained in use during the 1996-1997 school year, with the renovation taking place in phases.

The Claimant's Activities

The Claimant is a former teacher in the System. She has a degree in mathematics, and a certification in secondary education in mathematics from the College of Notre Dame. Additionally, she has a Masters of Administrative Science Degree from Johns Hopkins University, and has taken additional courses there since receiving that degree (TR 526).

For the 1996-1997 school year, the Claimant was assigned to Farimount, where she had taught mathematics since 1981 (TR 572). When the staff returned for the 1996-1997 school year, the principal, Ms. Elaine White, held a meeting at which the staff was informed that the school was undergoing a major eighteen month renovation. Several teachers voiced concerns about the safety of the building while this project was undertaken. According to the Claimant, she inquired whether the building was safe for staff and students while the renovation was going on, as she was concerned about the children who attended a Head Start program housed in the building, as well as pregnant females who were in the building. She also asked that an independent group be hired to assess the safety of the building. Ms. White and the contractor, who was also present, assured her and the other staff members that the building was safe. The Claimant, however, was not convinced (TR 144). According to Mr.

Elam, the building safety and education officer for the System,[2] Ms. White called him in August 1996 to discuss the Claimant's concerns regarding asbestos hazards. Mr. Elam acknowledged that there was lead-based paint and asbestos at Fairmount, but he did not consider it to be a hazard, because of the way it was being removed (TR 689).

Several days later, as she walked into the building, the Claimant noticed a sign on the door announcing that there was an asbestos abatement project at the school. She was concerned, and called the Occupational Safety and Health Administration when she got home; they referred her to the Maryland Occupational Safety and Health Administration (MOSH). She was provided with a form, and sent in a complaint about the asbestos abatement project (TR 144; CX 30).

On September 19, 1996, the Claimant arrived at school late, and noticed that a custodian was buffing the hallway by her classroom. She detected very strong fumes.[3] She saw the assistant principal, and told her that she was concerned about the fumes; the assistant principal told her to report it to Ms. White. The Claimant also told a fellow teacher about the fumes, mentioning that she would try to hold out for the day, and then go to the city clinic. According to the Claimant, her fellow teacher told her that he was breathing the fumes too, and would also go to the clinic. The Claimant taught her class, crying, and holding her head out of the window to get fresh air. Eventually, she informed Ms. White, and an ambulance was called to take her to the Union Memorial emergency room, where she was diagnosed with hyperventilation syndrome, and authorized to return to work the next day (TR 150-152; CX 31, 278). However, according to the Claimant, the following day, she went to her physician; she wanted him to authorize her to be off work because she felt that the school building was unsafe. She remained off work for about ten days.[4] By that time, MOSH had responded to her complaint, indicating that they would investigate (TR 154-155).

In October 1996 the System engaged an independent contractor to collect lead dust samples at Farimount. According to Mr. Elam, the earlier System-wide study performed in 1992 and 1993 had shown that there was lead paint on the walls, but no lead dust. The 1996 study was performed by Spotts, Stevens, and McCoy, an independent environmental contractor, on October 10 and 11, 1996. Forty five lead dust samples were collected, in accordance with HUD protocols, and analyzed in

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[2] Mr. Elam is a 25 year safety employee with the System; he is certified as a public sector inspector with MOSH, and provides risk assessment and management for all environmental health and safety issues for the System.

[3] The Claimant also stated that there were clouds of dust daily from the construction project.

[4] The record reflects that the Claimant was seen by Dr. Cosmo Jacobs on September 23, 1996, with complaints of headache, nausea, and difficulty breathing four days earlier. Dr. Jacobs noted that the Claimant was taken to the emergency room, and diagnosed with hyperventilation syndrome. He authorized the Claimant to return to work on October 1 (CX 133).

accordance with EPA methods. Mr. Scott Rifkin, who prepared the report, noted that six of the forty five samples contained levels of lead above HUD lead dust clearance standards for post-abatement reoccupancy (CX 278, 279). Three of these samples were from the basement, which was used only by the contractor, and was not open to students or staff. There were also elevated lead dust levels on the tops of lockers on the first and second floor, and on one third floor window sill. Mr. Rifkin felt that the elevated lead dust levels on the lockers and in the basement could be the result of prior renovation activity that impacted lead paint surfaces. In addition, the contractor performed x-ray analysis, again in accordance with HUD protocols, to establish an inventory of surfaces in the school that contained lead levels in excess of Maryland's definition of lead based paint. This testing showed that building components throughout the school contained lead based paint.[5] Mr. Rifkin made several recommendations, including a cleaning of the entire school by an accredited lead abatement contractor, with dust clearance sampling and analysis.

According to Mr. Elam, the System at that point could have performed more extensive sampling to identify any additional problem areas, but rather than spend additional money on sampling, the System hired a certified lead abatement contractor to clean the entire facility. There had previously been a fire in the basement that had spread paint fumes and lead dust. Most of the cleanup was done in the basement, which was not accessible by the faculty, students, or Head Start children, but was used by the construction workers. Additionally, the contractor cleaned all of the window wells and sills, as well as the outside and tops of the lockers. This cleaning took place in October 1996, and the contractor was required to take clearance samples before the area was released for occupancy (TR 694-695, 717-724).[6]

Meanwhile, in response to the Claimant's complaint, an OSHA inspector conducted an inspection at Fairmount, beginning on September 26, 1996. Nothing was found to substantiate the Claimant's allegation of raw sewage contaminating the drinking fountains. However, the inspectors noticed chipped and peeling paint in the hallways where dropped ceilings had been removed, as well as in some of the classrooms. As the school was scheduled to be repainted, the inspectors conducted a

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[5] On September 18, 1996, Ms. Teresa Pearson, the Center Director, notified the parents of children in the Head Start program that the Center would be closed as of September 18, 1996, until the ceiling area was repaired in satisfaction of the Health Department Licensing requirements (CX 278). The Department of Human Resources, which is required to certify the Head Start area annually, found in its October 1996 inspection that the paint in that area was lead safe, not lead free. Again, in early December 1996, the Head Start program was relocated, because the renovation project resulted in insufficient space to accommodate the students (CX 281, 107-108).

[6] At the Claimant's dismissal hearing, Mr. Elam testified that the lead abatement was also performed under the protocols established by the Maryland Department of the Environment, which requires that occupants be separated from construction by distance and containment (CX 281, 159-160).

survey for lead based paints. All of the paint contained lead in different concentrations; as this indicated a potential for lead exposure, the System agreed that the repainting would be done in accordance with lead standards. The inspectors noted that a pocket of asbestos in the basement had been identified and removed by the environmental contractor, and that air monitoring results were negative. The inspectors noted that the City Safety Department had done wipe sampling to check the dust at the work site, and that since all of the paint at the school was considered to contain lead by OSHA standards, the City had contacted a lead removal contractor, and had asked for surveillance by the MDE for the paint renovation process. The inspectors noted no violations during the inspection, and thus no citations were recommended (CX 278).

While the renovation project was going on in 1996 and 1997, there was also an asbestos abatement project at Farimount, performed by an independent contractor, with monitoring by an industrial hygienist. Signs were posted at the entrance to the school informing the occupants about the project. According to Mr. Elam, the policy was to perform this work after school hours, under containment. Once a problem was identified, the occupants were removed from the area, and before the area was released for occupancy, it was cleared by an industrial hygienist. Part of the work done by the abatement contractors was wet scraping in several classrooms to reduce flaking paint, which was done in November 1996; before the rooms were reoccupied, clearance samples were taken. All of the ceilings were scheduled to be encapsulated with suspended ceilings as part of the renovation project (TR 725-736).[7]

By October 31, 1996, concerned that the City Health Department was taking too long to release its findings, the Claimant again wrote to MOSH, asking that they come out to inspect the school and take their own air samples (TR 156-158). She questioned the motives behind the delay, and voiced suspicions about the validity of the findings (CX 33). MOSH responded on November 1, 1996, stating that they had conducted an investigation to verify her complaints, but had found no violations of MOSH standards (CX 34). Ms. Joyce Tapper, of MOSH, stated that a MOSH industrial hygienist had visually inspected the worksite, interviewed management and employees, and reviewed records maintained by the school. The inspector identified no violations of MOSH standards. The Claimant, however, interpreted this letter as confirmation that there was asbestos and lead at Fairmount (TR 159-160).

The day after the election, the Claimant went to work, but the building was very cold.[8] She

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[7] At the dismissal hearing, the Claimant specifically asked Mr. Elam why the building had not been shut down during the renovation project. He responded that the renovation was phased, and that the areas where penetrations were made by the contractor were not in occupied space (CX 281, 140).

[8] On November 6, 1996, Ms. White wrote a letter to the parents, advising them that part of the school renovation included replacement of the heating system, and that the building was without heat. She noted that the contractors were working to restore the heat, and that it was expected to be back

told Ms. White that she could not take it, and went home. Later that night, a colleague phoned her, and told her there had been a staff meeting, and a report concerning lead problems had been handed out. Indeed, the MOSH report reflects that the inspectors reviewed the results of tests conducted by the City Safety Department, and scheduled a meeting with teachers and staff to discuss their concerns. In response to concerns about asbestos abatement, the inspector explained that the abatement was conducted within the applicable guidelines, and provided the teachers with the results of air sample testing. According to the inspection report, the teachers were satisfied, although they were still concerned about the high levels of dust.

The Claimant obtained a copy of the four pages handed out to the teachers at the staff meeting (CX 94), which she felt confirmed all of her suspicions that there was lead almost everywhere in the building (TR 162-170).[9] The next morning, at 5:30 a.m., she called Ms. White at home to talk about the report, and her concern that there was enough lead dust in the building to poison everyone; according to the Claimant, she talked with Ms. White for several hours (TR 170).[10]

The Claimant also went to her physician to have her blood tested. The results were normal, showing that she had less than five micrograms per centiliter.[11] Nevertheless, she felt that these results confirmed that the building was not safe, and she was still concerned about the staff and students at the school. On the Friday after she got her blood test results, she went to Fairmount, but she did not sign in; she looked for Ms. White, who was in a meeting. The Claimant left her a message that she had had her blood tested, and she had lead in her system; and that the children needed to be tested (TR 185-

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on by Monday, November 11 (CX 278).

[9] In fact, the memorandum handed out at that meeting indicated that after problems were identified during an evaluation, measures had been taken to comply with dust recommendations. Additionally, it referred to the paint and wipe samples that were analyzed for lead, and the findings that the levels did not exceed guidelines, except for the tops of lockers, one classroom window sill, and the basement. It noted that MOSH had conducted an inspection and determined that the City had followed appropriate regulatory guidelines (CX 278). A second sheet contained a chart listing locations where lead had been found in paint samples collected by the Division of Safety as of September 17, 1996. There were four locations identified in the basement, two areas in a head start room, and two hallway ceilings. The teachers were also provided with the October 10 and 11 lead dust wipe sampling results (CX 294).

[10] Citing her status as an expert, the Claimant claims that the results of these tests support and validate her concerns, and show that there was enough lead to poison everyone at the school.

[11] At the Claimant's request, Dr. Jacobs took blood samples on November 8, 1996, and April 14, 1997, both of which were less than 5 mcg/ml (CX 133).

186).[12] According to the Claimant, a few days later, she called Channel 11, and a reporter came to interview her; this interview was broadcast, as were the four pages handed out at the staff meeting, which she provided to the reporter (TR 186-188).

The Claimant submitted videotapes of a number of news broadcasts reporting on her allegations of lead and asbestos hazards at Fairmount. They include an interview of the Claimant, in which she stated that she had her blood tested five days earlier, and it showed she had lead in her system, proving that there were high levels of lead in the school.[13] The news reports also included interviews with concerned parents, and reported on a meeting held at the school for parents of students, as well as parents of the Head Start children (CX 7A).

According to Mr. Elam, after receiving the results of the lead dust and paint sampling conducted by Spotts Stevens, the System consulted with the Maryland State Department of Environment, and the City Health Department, who were of the opinion that the System did not need to assess the children in the facility. However, Mr. Elam was not comfortable with the contractor's findings, and the System contracted with Johns Hopkins Bayview and the Kennedy Kreeger Institute to screen the occupants of the building. All occupants of the building were offered the opportunity to have their blood tested as part of this project (TR 679).[14] The testing was conducted from November 14 to November 21, 1996, and the physicians submitted their results on November 25, 1996 (CX 279). The System was provided with a summary of the overall results; the results of individual blood testing were given directly to the tested teachers and parents. The report reflects that the physicians who conducted the tests did not find any link between the lead levels found in the children and exposure in the school building, although several of the younger children may have had previous exposure to lead. Additionally, two adults who were tested appeared to have had problems with previous exposure to lead.

The news broadcast footage videotaped by the Claimant includes coverage of the decision to offer blood testing, and a statement by school personnel that an environmental contractor had been hired to clean up behind the general contractor, and that areas under construction were contained. There was also a follow-up report, reflecting that the blood testing showed no widespread exposure to lead at the school (CX 7A).

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[12] At the Claimant's dismissal hearing, Ms. White testified that although she recalled speaking to the Claimant several times about lead and asbestos issues, she did not recall speaking to her in early November, or receiving a message that the Claimant had lead in her system (CX 281, 104).

[13] It appears that, in fact, the Claimant did not have the results of her blood test until December 10, 1996, when Dr. Jacobs' records reflect that she Claimant was given the results by telephone.

[14] The newscasts videotaped by the Claimant suggest that the publicity surrounding her allegations may also have been an impetus behind the decision to do the testing.

The Claimant did not participate in the testing project conducted by Johns Hopkins. She was aware of the results of the blood sampling, but felt that lead would not necessarily show up in a blood test, as it is heavy, and goes eventually to the bones (CX 279). She felt that they waited too long to take blood tests, and that they should have used x-rays (TR 563).[15]

At some point, it appears that the Claimant filed a workers compensation claim in connection with her alleged exposure to lead and asbestos. On December 11, 1996, the Claimant underwent a psychological evaluation by Dr. Alan Peck, at the request of her attorney. Dr. Peck noted, *inter alia*, that the Claimant was obsessed with environmental hazards, but there was no evidence of a major thought disorder, delusions, or hallucinations. He diagnosed an acute stress reaction, and some depression, directly related to her perception of problems at the school. He was not certain if she was psychologically able to teach anywhere, and felt that she needed therapy and medication (CX 109).

After she left in early November 1996, the Claimant did not return to work at Fairmount until March 17, 1997. While she was off of work, she contacted numerous organizations about what she perceived to be continuing health problems at the school. She wrote to the City Council, which prompted Ruth Ann Norton, the Executive Director of the Coalition to End Childhood Lead Poisoning, to write to Dr. Amfrey, the Superintendent, on November 14, 1996 to inquire about the situation at Fairmount. Ms. Norton asked that the System conduct blood lead screening of the children in the Head Start program, and hire a certified lead contractor to perform a cleanup (CX 154). Dr. Amfrey responded in December 1996, explaining the System's protocols for training and prevention. He stated that the appropriate local and state regulatory agencies had reviewed the conditions, and determined that the school was safe for continued occupancy. However, he noted that as a precaution, the System was doing a thorough cleaning with a certified lead abatement contractor, in compliance with HUD guidelines. Additionally, he informed Ms. Norton that the System was screening all students and staff, and had developed protocols for impacting lead paint surfaces (CX 155). To the Claimant, however, Dr. Amfrey's letter showed that he felt there was in fact a lead based paint hazard at the school during the renovation project (TR 334).

The Claimant also engaged in a series of correspondence with Mayor Schmoke. The Claimant sent two memoranda to the Mayor dated December 3, 1996 (CX 82). The first questioned the

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[15] A memorandum from the Acting Chief Physician for the Office of Occupational Medicine for the City of Baltimore to the Law Department, dated August 25, 1997, indicates that Ms. Williams went to the Clinic several months after the blood testing project, complaining that she was suffering from lead exposure, and that she had never had her blood lead level tested. However, she refused to have it tested at that time, stating that she was sure it was low, due to her good eating habits and exercise. The Claimant denied any treatment or diagnostic studies for lead poisoning (CX 136). Of course, this was not true, as she had her blood tested on at least one earlier occasion by Dr. Jacobs. She had also, by her own account, reported to Ms. White that she had lead in her blood.

reliability of the results of the blood testing conducted by Johns Hopkins, and the second set out additional health and safety concerns relating to the bathrooms, the availability of facilities for washing hands or drinking water on the third floor, the fact that six exits were blocked off due to renovation, the fact that teachers were sharing a classroom and physical education classes were being held in the cafeteria, and the existence of fire code violations due to the encapsulation. She asked that the students and staff be evacuated and relocated. On January 3, 1997, the Mayor responded, indicating that he had referred her memoranda to the Personnel Director, and that the issues she raised were being investigated by the safety and facilities personnel (CX 83).

On February 11, 1997, the Mayor again wrote to the Claimant, stating that the Superintendent had directed that Mr. Giles conduct an investigation and assessment of the environmental conditions at Fairmount (CX 84). He cited to the results of the investigation by MOSH in November 1996, noting that the facility was found to be in satisfactory condition for occupancy. He also referred to the report of the Fire Department, which inspected the facility in December 1996 and found it to be satisfactory. He noted that blood level assessments had been conducted, and that the results were privileged information for the persons who had been tested. With respect to shared classrooms, he noted that the principal had provided for a common science classroom, with shared team teaching, and that faculty members would experience minor inconveniences during the renovation. Finally, he noted that the Department of Facilities coordinated weekly progress meetings, and continued to monitor the conditions of the facility. He stated that the current action plan provided a safe and healthful work and learning environment.

The Claimant was not satisfied with this response, and wrote to the Mayor again on February 18, 1997, stating that she had information proving that the Mayor was not completely or accurately informed, and she wished to be allowed to present the facts to him. She repeated that lives were being endangered daily at Fairmount (CX 85). Again, the Mayor responded on March 17, 1997, stating that he had been advised that the Claimant had filed a workers' compensation claim regarding the matters in question, and recommended that she contact the Associate City Solicitor directly (CX 86).

When the Claimant reported back to school on March 17, 1997, she was called to the office, and told to report to the health clinic to follow the procedures for being out on leave for an extended time period (TR 354-356). The Claimant completed an Incident Report, alleging that an incident occurred on November 7, 1996. She stated that she was tested for lead exposure on November 8, 1996, which showed that she had lead in her system. Additionally, she stated that she had lead deposits in her bones and various parts of her body (CX 163).[16] Ms. White indicated on the form that the Claimant had been out of school since November 7, 1997, and that she had no documentation of

[16] In fact, Dr. Jacobs' report of the test results show a normal blood level. Nor is there any documentation in the record to support the Claimant's claim that she has lead in her bones and other body parts.

exposure. She reported that all staff who desired testing were tested by Bayview, and that the school had been cleaned according to protocol. She indicated that the Claimant needed clearance to return to work. The Claimant received clearance as fit for duty, to return to work on March 17, 1997 (CX 164).

According to the Claimant, on her first day back, a senior who was a former student of hers came into her classroom, and told her that she had lead in her system from her food service class. This student is Tiffany Burgess, who did not appear as a witness at the hearing. According to the Claimant, Ms. Burgess told her that she had so much lead in her system, her physician advised her to have an abortion (TR 206). The Claimant videotaped an interview of Ms. Burgess, in which she, with much coaching from the Claimant, described how she fainted during her food service class just before the Christmas break. Ms. Burgess stated that she was taken to Johns Hopkins, where, by her account, she stayed for two nights. According to Ms. Burgess, the principal, Ms. White, knew there was lead in the school, but tried to keep it hushed up. She acknowledged that many of the teachers were tested, but their results were negative. According to Ms. Burgess, she was also tested, and had lead in her blood, which had to be from the school, since her house, as well as the houses of her relatives where she spent time, were tested, and did not have lead. She claimed that after her mother spoke with Ms. White, she received a check from Ms. White in the mail over the Christmas break. Ms. Burgess did not ask what the money was for, but assumed that it was "hush" money. She claimed that she never received any kind of award.

The record does not contain any medical or scientific reports, or indeed documentation of any kind, confirming that Ms. Burgess had lead in her system, much less from any exposure at Fairmount.[17]

In contrast, at the Claimant's dismissal hearing, Ms. White testified that Ms. Burgess had fainted during her food service class, possibly because the temperature was too high. She testified that Ms. Burgess was given a $500 scholarship, which was customarily given to a student in the food service program at their graduation in June, to defray the expenses of attending a culinary school. Dr. Abernathy, at the time the Southeast Area Superintendent, testified that she wrote the check, which was a scholarship, at the request of the food service teacher (CX 281, 360-363).

The Claimant testified that on her return to work in March 1997, she walked around the school, noting that the dust was worse, and the barriers did not appear to enclose the construction properly. Over the next few days, she videotaped the hallways, as well as the bathrooms (TR 206-209). Ms. White learned that she was videotaping, and called her to the office, where she asked the Claimant if she was videotaping. According to the Claimant she did not answer, because she did not want Ms.

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[17] The Claimant spent quite a bit of time videotaping close-up shots of what was represented to be Ms. Burgess's vomit in a wastecan, suggesting that Ms. Burgess was sick because of her lead exposure.

White to take her tape (TR 209).[18] She then met with parents at Hartford Heights Elementary School, and showed them the tapes. She told them that there was lead paint and dust in the building.

This footage, which is extremely difficult to watch, as it is terribly jerky, shows a hallway, and an inoperable water fountain outside the door of what the Claimant states was her classroom. There are shots of various ceilings, as well as quite a bit of footage of what appears to be a construction trash area outside the building. The video includes shots of what the Claimant characterizes as a construction area that is not properly encapsulated; in fact, a sign on the barrier identifies it as a closed stairwell. There are shots in a bathroom, showing missing ceiling tiles and flaking paint. The Claimant's voice can be heard on the tape, saying that she did not know if it was lead or asbestos, but that it was a health hazard (CX 7A).

The Claimant wrote again to the Mayor on March 22, 1997, stating that she would drop her workers' compensation claim if she could just meet with the Mayor, and get the children out of their unsafe and unhealthy facility at Fairmount (CX 87). She claimed that the school system's own data showed very high levels of lead in the paint, as well as high results on the wipe samples, and that it was urgent to remove the children during the renovation project. She indicated that she had videotapes that she did not want to take to the media, but that she would if she had to (TR 202).

Apparently the Claimant decided that she needed to take her tape public, and she just happened to have it with her when she attended a city council meeting on April 9, 1997, on the subject of lead paint poisoning. The Claimant handed out copies of the reports given to the teachers at the November 6, 1996 meeting, claiming that the lead dust samples that were tested were extremely high in certain areas, particularly in the basement. The Claimant did not mention that the basement was used only by the contractors, and was off limits to staff and students. She claimed that there was enough lead at the school to poison someone in a matter of seconds. She also claimed that MOSH had written to her, telling her that there were concentrations of lead in areas of the building. She referred to the construction barrier seen on the videotape enclosing the closed stairwell, claiming that it was not properly enclosed; she stated that the contractors were doing something behind the barrier, but she did not know what. In referring to the spots on the ceiling, which appeared to be leaks or peeling paint, she claimed to know for a fact that they were hazardous. In response to a direct question from Councilman Kane, she stated that she did not know if the school had been cleaned since the testing.

In fact, this was not true: the Claimant had been informed by MOSH that the school had been

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[18] Ms. White sent the Claimant a memorandum, dated March 19, 1997, indicating that two staff members had informed her that the Claimant was videotaping a renovation area in the building, and that when Ms. White asked the Claimant if she was videotaping, the Claimant stated that she would not answer. Ms. White repeated her verbal order to cease her videotaping, and stated that her failure to comply with that request would be considered an act of insubordination (CX 1).

cleaned, and that lead and asbestos protocols were in place. This information was also provided to the teachers and staff. Indeed, the videotapes of the newscasts submitted by the Claimant report that these steps were taken by the System.

The Claimant's allegations again hit the media, which showed clips of her videotape, and an interview in which the Claimant claimed that the stairwell barrier was not properly enclosed, and stated that she would not go back until everyone was tested. The media reports also show that Councilman Kane toured the building, and determined that the construction area was well-contained, and the occupied areas appeared clean. The Claimant was incredulous at this conclusion (TR 211-213).

The day after the City Council meeting, the Claimant again noticed strong fumes in the hallway near the cafeteria. She went to Ms. White and told her about the fumes, and the constant clouds of dust, and told her that she could not stay at the school in those conditions (TR 216-217). The Claimant left work, determined not to go back until she got some documentation that the school was safe. She felt that she was entitled to a clearance, to show that the lead abatement jobs were properly done (TR 220-221).[19]

A memorandum sent by Ms. White to Ms. Wighton, the Southeast Area Assistant Superintendent, dated April 10, 1997, indicates that on that day the Claimant came to her office, highly agitated, crying, flushed, and speaking loudly and rapidly (CX 2). The Claimant told Ms. White that she could not breathe because of the fumes and dust in the building. As she left, the Claimant stated "It is a disgrace what is happening to the students in this building. The building is unsafe. What is being done in the dark will come to light. I'm going to see to it." Ms. White investigated the Claimant's complaint, and found that there indeed was a peculiar odor on the third floor, caused by a commercial art teacher spraying a wicker basket with Krylon paint. According to Ms. White, the room was properly ventilated, but the odor was noticeable. She saw no visible evidence of dust, but noted that before she went up to that floor the contractor had been mounting a floor drain in the bathroom, which caused some noise and vibration. She also checked with other teachers in the immediate area, but no one had experienced any problems.

Ms. White also reported that later that afternoon, a representative of the Baltimore City Health Department came to inspect the building, but found no evidence of environmental violations. She also received a call from Councilman Kane about the condition of the building. Ms. White noted that she had received several calls from parents over the previous two weeks, asking about the condition of the building, and reporting that a teacher was telling their children the building was unsafe. One of the parents also told a staff member that the Claimant had called and invited her to a parents' meeting. She also was told that the Claimant had appeared on public service television stating that the building was

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[19] The Claimant was apparently referring to the HUD requirements for Class 2 dwellings, which provide that before such a dwelling can be reoccupied, it must be inspected and cleared.

unsafe.

In that same memo, Ms. White also advised Ms. Wighton that she felt that the Claimant's presence in the building was detrimental to the successful operation of the program. She noted that there were many problems as a result of the renovation, but that the staff and student body had borne up well under the circumstances. She asked that the Claimant be immediately relieved of her teaching duties at Farimount, and reassigned. Ms. White indicated that this would also be in the Claimant's best interest, as she had good teaching skills that could be used in an environment where she felt safe.

On April 17, 1997, Ms. White wrote to the Claimant, advising her that upon her clearance to return to duty, she was to report to the Southeast Area office, because of her concerns over health and safety due to the renovation of the building. She was also advised that she needed to complete an Employee Incident report for her illness, which started on November 7, 1997, in order to be seen at the Occupational Medicine and Safety office. Additionally, Ms. White reminded the Claimant that an absence of five consecutive days required medical verification of her illness, and that her documentation was due on April 18, 1997 (CX 3).

The Mayor again responded to the Claimant on April 24, 1997, although this particular letter is not in the record. However, on May 2, 1997, the Claimant wrote back, expressing her disappointment that the Mayor was not doing what she perceived to be his job with respect to the issue of potential lead and asbestos exposure at Fairmount (CX 88). The Claimant also expressed displeasure at being referred to other parties for her complaints. She set out in detail the actions she would take if she were Mayor, and asked the Mayor to review the videotape of the City Council Hearing on Lead Poisoning that took place on April 9, 1997.

On April 30, 1997, the Claimant appeared at a hearing regarding a cemetery, and brought up her allegations about Fairmount, claiming that it had been proven that there were lead and asbestos violations at the school. She claimed that a teacher had been taken away sick that very day, and she hoped it was not from lead. She also claimed that a third of the school population had upper respiratory infections, possibly from lead exposure. This prompted a flurry of news reports on the subject of sick schools (CX 7A).

The Claimant also heard from the City Solicitor, who wrote to her on May 9, 1997, and told her that the Mayor had asked him to look into the issues she raised in her May 2 letter. He indicated that they would review the Health Department and Department of Public Works records of any possible contamination at the building, and contact her with their findings (CX 89).

The Claimant again wrote to the Mayor on June 6, 1997, informing him that it was Lead Awareness Week, and asking him to discontinue the demolition of private homes in Baltimore City (CX 90). The Mayor responded on June 13, 1997, indicating that he had forwarded her letter to the Housing Commissioner and asked him to look into the issues she raised, and respond directly to her

(CX 91).

The Claimant apparently did not return to work that school year. By the Claimant's account, she was "totally stressed" by what she viewed as a brushoff by the Mayor, whom she tried repeatedly to get to do something about what she perceived as problems with lead at Fairmount. In response to her numerous letters, he cited to the results obtained in the blood sampling study conducted by Bayview. During that time, the Claimant continued to be treated by Dr. Peck for stress and anxiety (TR 194-204).[20]

The Claimant had been to see the Commissioner of the Health Department and showed him her video, and given him the four pages that were handed out to the staff in November 1996. According to the Claimant, he told her that if an expert said that Farimount was not safe, he would close the school. Perceiving that her complaints would carry more weight if she became an expert, she took a two-day course on lead abatement while she was on sick leave in April 1997. She also took various courses during the summer, becoming certified as a lead abatement expert in August 1997 (TR 222-228, 526-533).

Ms. Sandra Wighton, who was the Southeast Area Assistant Superintendent for the Baltimore City Schools from 1994, and is currently managing director of the Office of School Improvement, testified that it had come to her attention, and indeed was public knowledge, that the Claimant had raised concerns about the conditions at Fairmount (TR 80). Ms. White, the principal at Fairmount, requested that the Claimant be transferred, as the Claimant had indicated that she was not comfortable there, and Ms. White felt that her presence was detrimental to the functioning of the school. Ms. Wighton felt that it might be better to transfer the Claimant to another area, and she agreed with Ms. White's request (TR 80, 91). According to Ms. Wighton, the Claimant was transferred because the principal requested it, based on the Claimant's repeatedly expressed concerns about the environment, and the fact that she had not reported to work. Ms. Wighton felt that there was a better chance that the Claimant would report to work and do her job if she were transferred to another school. According to Ms. Wighton, the transfer was not a disciplinary action. Thus, in late August 1997, the Claimant received a letter from Ms. Fields, the principal at Southeast Middle School (Southeast), telling her that she would be teaching eighth grade at Southeast the following school year (TR 233).

However, the Claimant called Ms. Fields on the first day of school, and told her that she was taking sick leave, because she was not able to come to work (TR 241-242). The Claimant felt that Ms. Fields was not concerned about her "condition": Ms. Fields told her that she had a math vacancy to fill, and insisted that she come to school. The Claimant called Dr. Peck, and told him that she could

[20] In fact, the record reflects that the Claimant was being seen by Dr. Peck, but that she was resistant to his suggestion of therapy or medication.

not go back; Dr. Peck in turn wrote a letter to Ms. Fields about the Claimant's condition.[21]

The Claimant's hearing on her workers' compensation claim was scheduled for September 2, 1997. However, the hearing was postponed because she had not attended a psychiatric evaluation as ordered. The Claimant was upset, because she had planned to "reveal the truth" about the health hazards at Fairmount in the hearing. In fact, she had asked her attorney to request an injunction from the hearing judge, closing the school (TR 233-234, 39-40).[22] Instead, the Claimant authored a letter to the Mayor, citing her "wealth of expertise in lead hazard control and evaluation," and listing her training and status as an expert. The Claimant stated that she had reviewed the 1993 and 1996 inspection reports, and that they were "terribly unreliable, incomplete, and inaccurate."[23] She requested that an analysis be performed on every painted surface inside and outside the building, as well as dust wipe sampling on every surface in every room, and soil analysis in the play area. Indeed, she offered to do the dust wiping and paint inspection herself. She requested that the facility be shut down until this was completed, and the facility was cleared (CX 8).

The Claimant went to Fairmount with copies of her letter. According to the Claimant, she intended to distribute this letter to Ms. White and other teachers at the school. However, she did not sign in at the office, and when Ms. White saw the Claimant on the third floor of the school, she informed her that she should not be distributing correspondence during school time, and told her to leave (TR 234-235).

The Claimant also put copies of this letter on the cars in the Southeast parking lot (TR 650).[24] According to the Claimant, she got neighbors to help her distribute this letter in the Southeast neighborhood, as well as the parking lot of the church attended by Ms. White, the principal at Farimount. She also sent this letter to the Baltimore Times, where it was printed; she wrote to numerous persons, including Oprah, about her concerns. In the Claimant's own words, she was on a crusade:

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[21] Although there are many letters from Dr. Peck addressed to the Claimant's attorney, the record does not include any addressed to Ms. Fields. There is a letter dated September 25, 1997, to the sick leave bank, reflecting that the Claimant was overwhelmed with concerns about the environment, and did not understand that she may have psychiatric problems that could be treated with therapy and medication (CX 122).

[22] Although both parties apparently agreed that the Claimant suffered from a stress induced condition with respect to her environmental concerns at Fairmount, the Court ultimately found that her condition was not compensable under Maryland law (CX 301).

[23] The Claimant did not offer specifics.

[24] Ms. Wighton learned about this, and asked Ms. Fields to verify whether the Claimant had reported for work on that day at Southeast. It does not appear that she did.

her mind was focused on getting Farimount closed. She could not believe that, even after she had been trained as a lead expert, no one was listening to her or doing anything to close the school (TR 241, 244-245, 340).

Ms. Wighton received a memorandum from Ms. Fields on September 2, 1997, advising her that a school police officer had reported that the Claimant's flier had been found on windshields in the Southeast school parking lot. This memorandum indicates that a school police officer went to Ms. Fields' office at about 11:17 a.m, with a copy of the Claimant's letter, which was on each windshield in the school parking lot. The police officer told Ms. Fields that she had made her most recent round of the parking lot at about 10:30, and that the fliers were not on the cars at that time. Ms. Fields indicated that the content of the document did not upset her, but she was upset that someone would distribute any material on school property without the principal's permission or knowledge. She believed that this was illegal (EX 31). According to Ms. Wighton, Fairmount had been certified as safe at that time. The Southeast Area Office also received calls from parents about the flier (TR 112-115).

Ms. Fields wrote to the Claimant on September 4, 1997, indicating that she had received a copy of the Claimant's doctor's certificate, but that it was unclear from the statement when she would return to work, nor did it contain a diagnosis of her illness as required by payroll. She requested that the Claimant contact her so that the appropriate form could be submitted to payroll (CX 165). Attached was the Claimant's "doctor's certificate," which consists of a brief note indicating only that Dr. Peck saw the Claimant on September 3, 1997, and that she was still under his care.

On September 7, 1997, the Claimant responded, asserting that under the teacher's contract, Dr. Peck's note was sufficient, and that she would bring the appropriate documentation, reflecting that she was capable of returning to work, when she did return to work (CX 166). The Claimant expressed her feeling that Ms. Fields was not following the contract, and was harassing her and treating her in an arbitrary and capricious manner.

The Claimant send a memorandum to Ms. Wighton dated September 10, 1997, enclosing her letter to the Mayor, and setting out her credentials as an expert. She asserted that by law she was entitled to documentation that her new environment (i.e., Southeast) was in compliance with the criteria for lead safe housing, and demanded that she be provided with it before she was coerced to report to Southeast (CX 11).[25]

Meanwhile, the Claimant continued to write to the Mayor, citing her training. According to the Claimant, she also began to notice the many demolition projects in the city, and wrote to the Mayor about her concerns regarding possible lead hazards in the demolition of old buildings and homes in the city. She took dirt samples at various demolition sites around the City, and sent them for testing, finding

[25] The Claimant apparently filed a grievance procedure over her transfer to Southeast.

levels of lead higher than recommended. In a September 27, 1997 letter to the Mayor, she demanded that steps be taken to address the lead problems at the demolition sites. He referred her letter to the housing department, but she never received a response.

Ms. Wighton testified that the Claimant did not report immediately to Southeast, but indicated that she wanted to be assured that the school was safe before she reported there for work. Ms. Wighton found that to be unusual, as they do not provide such assurances to teachers. As far as Ms. Wighton was aware, the Claimant never provided any justification for her absence at the beginning of the school term, either to her or to the principal, Ms. Fields. The Claimant was transferred to the "996" payroll, which is an inactive payroll for teachers who are absent more than five days without documentation, as of October 10, 1997. This allowed Ms. Fields to show a vacancy in the mathematics department, so that she could hire another teacher (TR 91, 106; CX 12).

On October 24, 1997, the Claimant wrote to Ms. Wighton, informing her that she would return to work in a few weeks. She claimed that she knew and could prove that the environment at Fairmount was unsafe and unhealthy[26], but that she wanted to return to teaching in another building until the renovation there was complete. She again asked for documentation that Southeast was lead safe, citing the statutes that require clearance testing before an individual is moved back to a dwelling after lead risk reduction. She indicated that if she had not received such documentation when she returned to work, she would document the health hazards and forward them to others (CX 14).

A memorandum from Ms. Wighton to the Director of Personnel Services, dated November 10, 1997, reflects that Dr. Banks, of the Office of Labor Relations, had reviewed the Claimant's file, and suggested that the Claimant undergo a "fitness for duty" examination before she was reassigned to a school. Ms. Wighton noted that the Claimant taught at Fairmount during the 1996-1997 school year, and was greatly disturbed by the discovery of asbestos during renovation of the school. She indicated that the Claimant initiated a "campaign" of interviews with the media, picketed the school, and placed fliers on faculty cars at numerous Southeast Area schools during the summer and fall, alerting them to alleged dangers at Fairmount, and claiming to be a licensed environmental specialist. Ms. Wighton indicated that the Claimant also placed fliers on cars at the church that the Fairmount principal attended. Ms. Wighton noted that the Claimant had failed to report to work at Southeast, and as a result of her excessive absence, had been placed on the inactive payroll. Handwritten notations by Ms. Wighton indicate that the Claimant was released by the clinic as fit for duty. However, the only math vacancy, other than at Southeast, was at a school where another teacher had been approved for a transfer. Her note reflected that the Claimant would be assigned to Southeast unless a deal could be worked to put her in another area. Ms. Wighton indicated that she would prefer that the Claimant be transferred to another area, as she had already prejudiced herself by putting her fliers on staff cars at Southeast (CX

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[26] The Claimant never provided specifics on her claim; it appears that her only "proof" was the surreptitious videotape footage she made the previous spring.

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On November 14, 1997, the Claimant returned to work at Southeast. She discovered that she had been assigned to an open classroom, divided by partitions (TR 360-361). According to the Claimant, she had sent Ms. Fields a letter from Dr. Peck, stating that she was not able to function as a teacher unless she was in a classroom, and Ms. Fields knew that she was being treated for stress and depression.[27] The Claimant informed Ms. Fields that the open classroom concept was outrageous and disruptive, and requested that she be put in a regular classroom (TR 361). The Claimant felt that Ms. Fields spoke to her in a degrading manner; she could not understand why she was not immediately accommodated, as the noise levels bothered her and caused her headaches and stress, and there were classrooms available. According to the Claimant, after she pushed the issue, she was assigned to a regular classroom (TR 362). Although the Claimant acknowledged that most of the teachers at Southeast worked in open classrooms, she testified that Ms. Field's failure to act immediately on her request constituted retaliation. The Claimant submitted a voluntary transfer request (TR 71, 567).

The Claimant testified that at some point, she head a rumor from a parent that there were lead problems at Highlandtown Middle School. One day after school was out, she took her video camera to the school, where she was escorted around the building by a member of the custodial staff. According to the Claimant, she had been warned not to videotape at Fairmount, but no one had told her not to videotape at Highlandtown. However, she did not sign in at the office, as she knew the principal there would not have allowed her to videotape. In her view, the health and safety concerns of the students were more important than following the rules. Although the Claimant planned to show this videotape to the school board, she was unable to do so, and did not in fact show it to anyone (TR 345-347).[28] The Claimant also filed a report with MOSH, which did an investigation, finding no lead based based paint hazards. The Claimant found this to be very suspicious. She knows that the school has lead based paint, because it was built in 1933, and her videotape shows that there is chipping and peeling paint. In her opinion, the school should have been closed.

The Claimant testified that sometime in the spring of 1998, she was driving past James Mosher Elementary School, when she noticed that the exterior of the building appeared to be deteriorating. She returned with her video camera, and took footage of the exterior of the building. She also wrote to MOSH to complain about the conditions (TR 397-399).

The Claimant prepared a flier alleging that there were hazardous conditions at James Mosher,

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[27] Letters from Dr. Peck to the Claimant's attorney reflect that he considered psychiatric care for the Claimant to be essential, but that she was resistant to medication. They do not mention anything about the Claimant needing her own classroom until August 1998 (CX 122-126).

[28] This videotape shows the exterior and interior of Highlandtown, including ceilings with peeling paint, and the boy's bathroom (CX 7B).

as well as Highland and Farimount, which she handed out to parents as they left James Mosher with their children, and distributed in nearby apartment complexes (TR 652-655). This handwritten flier refers to lead paint hazards at James Mosher, Highlandtown, and Fairmount, and states, *inter alia*,

These 3 schools (and who knows how many more!!) Have been cited for lead-based paint hazards by an expert on lead abatement.[29] Your child or the individuals that work in these schools need to be tested for lead and asbestos exposures.

The Claimant identified herself as a "lead expert" at the bottom of the flier, and provided her telephone and telefax number, and e-mail address.

The record reflects that on April 20, 1998, Ms. Wighton forwarded this flier, as well as a hand-written cover letter instructing parents to have their children tested to save them from being potentially lead or asbestos poisoned, which had also been distributed at Highlandtown Middle School on April 8, 1998 to Mr. Giles, the Manager of Facilities (CX 10). Ms. Cascelia Spears, the principal at James Mosher, testified at the Claimant's dismissal hearing that in April 1998, her office heard from numerous parents about a flier that had been distributed about lead and asbestos contamination, with the Claimant's name on it, as well as a letter by the Claimant asking that parents attend an open hearing (CX 281, 121-126). Mr. Giles responded to Ms. Spears in a memorandum dated May 11, 1998, stating that his department was not aware of any citations that had been issued for lead paint or asbestos hazards in any of these three facilities. He noted that every school in the System had been inspected in compliance with the Asbestos Hazard Emergency Response Act, and that copies of the Plan were available for review in the office.

According to Mr. Elam, James Mosher is an older facility, but there was no construction going on in the building. In addition to the testing done by MOSH in response to the Claimant's complaint, the System collected samples, which showed that there was lead paint on some wall surfaces, as well as the exterior window frames. The System scheduled scraping and painting of the exterior windows. Additionally, as wipe samples from the window wells showed lead levels above HUD guidelines, the System brought in an independent contractor to clean all of the window wells and sills, by wiping them down with a phosphorus solution (TR 684-687).

The record reflects that the Claimant filed a complaint with MOSH on March 16, 1998, alleging that there were hazardous conditions at Highlandtown, and asking that the building be evacuated and assessed (CX 227). Her complaint was referred to Highlandtown by MOSH (CX 230). The record also includes the Claimant's April 4, 1998, complaint to MOSH, in which she cites her qualifications, and alleges that James Mosher Elementary School had serious exterior lead hazards,

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[29] The "expert" referred to was the Claimant; the specifics of the "hazards," or any supporting documentation, are not in this record.

and that she had videotaped the exterior (CX 278). She felt that the building needed to be evacuated, and assessed for lead and asbestos hazards. On April 9, 1998, the Claimant again filed a complaint with respect to James Mosher (CX 231). On May 7, 1998, the Claimant again wrote to MOSH, requesting that an inspector visit Highlandtown immediately, to determine if the school needed to be closed. She also claimed that there was documentation that persons attending James Mosher had elevated blood lead levels (CX 233).[30]

In response, MOSH inspectors performed an inspection at James Mosher, which included paint sampling and analysis. As five of the samples showed the presence of lead paint, wipe sampling was performed in July 1998. Those results showed that there was lead based paint on a window near three vents in one room, and on a window ledge in another room. Air monitoring in the room with the window near the three vents resulted in a reading below the limit of detection. Three citations were issued in connection with electrical issues, but none in connection with lead based paint or asbestos hazards, although MOSH made some recommendations, including informing the summer clean-up crew of the sampling results so that they could protect themselves while working, performing more extensive sampling to determine the extent of the lead bearing dust, and abating the exterior and interior lead bearing paint throughout the building.

MOSH also wrote to the Claimant on July 9, 1998, to report that they had conducted an inspection at Highlandtown. The inspector had observed several badly damaged walls with peeling paint, but no process that would generate airborne lead levels. An air sample was taken in the third floor teachers' lounge, but no airborne lead was detected. Samples were also taken of the chipping paint. The inspector observed no friable asbestos, nor was there any work being done that would be likely to damage or disturb any asbestos containing material. He noted that the school had an asbestos management plan. The results of the samples were provided to the Claimant (CX 235). However, the Claimant found it very suspicious that MOSH did not find lead paint at Highlandtown, as it was built in 1933, and therefore is presumed to have lead paint. Her videotape shows this paint chipping and peeling, and therefore she felt that it should have been closed (TR 587-588).

The Claimant did not receive a formal assessment of her performance for the 1996-1997 school year, due to her sporadic attendance (CX 5). In her Annual Evaluation Report of the Claimant for the 1997-1998 school year, Ms. Fields indicated that the Claimant met expectations in all criteria. She commented that the Claimant made an excellent adjustment in a difficult situation, by being flexible even when she was given a classroom change. In her comments on her evaluation, however, the Claimant took issue, stating that she had not been "given a classroom change," but that she had requested to be moved to a classroom, and as a result, was able to work away from the chaos of an

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[30] There is no such documentation in this record. In addition, James Mosher was not one of the schools that had been identified as having problems with lead in the water in the 1993 study of the System schools (CX 281, p. 131).

open space environment. She referred to the fact that she could not tolerate the mental, emotional, or physical disruption of an open-spaced environment. She also asked for a response to her April 3, 1998 letter asking about her upcoming classroom arrangement, and that her request for a voluntary transfer be honored (CX 278).

However, in August 1998, the Claimant received notice that she was again assigned to Southeast. According to the Claimant, all of the mathematics teachers were based in one room, and they moved to different classrooms to teach their classes. The Claimant felt that she was being harassed as a whistleblower, and before school started, she wrote to Ms. Fields to request that she be moved to a separate classroom, or transferred. Subsequently, Ms. Fields, as well as the department head, met with her, and she explained her problems with the open space, and the fact that there were too many teachers in the room. The Claimant felt that Ms. Fields was rude and disrespectful; Ms. Fields told her she could only transfer if she got a replacement. The Claimant, however, did not think it was her duty to obtain a replacement if she wanted a transfer. She went home. A few days later, according to the Claimant, the department head called, and told her that they did not want to lose her as a math teacher, and the other math teachers had decided to move the math department downstairs, leaving her the classroom for herself (TR 363-369).[31]

The Claimant returned to Southeast on September 15, 1998. Problems soon arose, however, and on September 25, 1998, Ms. Fields met with the Claimant to discuss her latenesses and absences. Ms. Fields also requested that the Claimant keep her emergency lesson plans in the office. This offended the Claimant, who always had emergency lesson plans for a substitute, which she kept in her drawer. She refused to agree to keep them in the main office. Again on September 29, the Claimant and Ms. Fields met to discuss the new starting time for teachers, which had been changed from 8:30 a.m. to 7:35 a.m. The Claimant had a conflict, as she had to drop her son off at school in the morning; she felt that she was being treated unfairly, as Ms. Fields knew of this situation.[32] The Claimant asked for a transfer to a senior high school, where they started later. Ms. Fields refused, because she did not have a replacement for the Claimant (TR 374-377).

In her testimony at the Claimant's dismissal hearing, Ms. Fields indicated that the Claimant had serious attendance problems at Southeast (CX 281, pp. 68-69). She asked the Claimant to meet with her several times, and after a meeting on September 28, 1998, sent her a memo confirming the meeting,

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[31] Ms. Fields documented this with a memorandum to the Claimant dated September 15, 1998 (CX 201). The Claimant responded the next day, taking issue with what she viewed as Ms. Field's unprofessionalism, inappropriate body language, and lack of cooperation in trying to resolve the matter, as well as what she viewed to be unsubstantiated allegations in the September 15 memorandum regarding the Claimant's duty to walk students to class (CX 202).

[32] In fact, the decision to change the starting time was made by the School Board, not by Ms. Fields (CX 281, p. 371).

and the fact that the Claimant had been late 15 times during that school year. Ms. Fields referred the Claimant to the staff handbook with the attendance reliability policy. According to Ms. Fields, the attendance problem had gotten to the point of "almost impossible."[33]

The Claimant testified that after she was transferred to Southeast, she heard rumors from staff persons that the drinking water was contaminated with lead. She noticed that the staff had bottled water in the teachers lounges, but the students were drinking from the fountains. She tried not to get involved, and said nothing about this during the 1997-1998 school year (TR 424-425).[34] During the 1998-1999 school year, she continued to hear such rumors, and she asked Ms. Fields about them. According to the Claimant, Ms. Fields told her that there had never been a problem with lead in the water.[35] According to the Claimant, someone on the staff told her that there had been a letter about lead in the water in City schools, including Southeast, but she never saw any documentation of this (TR 425). In January 1999, she wrote to MOSH, who responded that this was out of their jurisdiction, but they would refer her complaint to the Health Department (TR 427; CX 246). The complaint, filed by the Claimant on January 1, 1999, alleges that the water fountains could be contaminated with lead or other hazards, and that there were rumors of lead in the water (CX 245).

At the Claimant's dismissal hearing, Ms. Fields testified that on February 10, 1999, she asked the Claimant to meet with her as soon as possible, but no later than February 12.[36] The Claimant did not report as requested. On February 24, 1999, Ms. Fields sent the Claimant a memo, again scheduling her for a meeting on February 26, and informing her that it was essential that she meet with the Claimant. The Claimant refused to sign the notice. According to Ms. Fields, at that point, the

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[33] At the Claimant's dismissal hearing, Ms. Fields testified that the Claimant was absent six times between November 19, 1997 and June 1998; no latenesses were listed, because such records were not kept that school year (CX 281, 367).

[34] The record reflects that the Claimant was "involved" during that time period in making complaints about the alleged conditions at James Mosher, Highlandtown, and Farimount.

[35] In contrast, at the Claimant's dismissal hearing, Ms. Fields candidly discussed the results of the 1992-1993 System-wide study, which showed that there were in fact lead problems at Southeast, which were addressed by shutting off certain fountains, and providing bottled water stations for the students and staff. This was no secret, and according to Ms. Fields, the report was posted on the bulletin board in the office.

[36] Ms. Fields had provided the Claimant with a notice of "attendance reliability," showing five absences as of January 26. The Claimant refused to sign the notice, stating that she wanted to check the handbook and with the payroll clerk. Ms. Fields then instructed her secretary to hand deliver a notice, which the Claimant again refused to sign.

Claimant had been absent nine and a half days, and late 85 times during that school year (CX 281, pp. 69-72).

In response to a call from the Claimant, asking them to come out and inspect the drinking fountains for lead, the Health Department went to Southeast on February 11, 1999, took samples, and found that one of the fountains that was supposed to be turned off, outside the main office, was in fact on.[37] Their report showed low water pressure in some of the fountains, and faucet deterioration in others. The Health department recommended that the fountain outside the main office be turned off, and that additional bottled water drinking stations be added. The school system was not cited for any lead problems at Southeast. As the school had added additional water stations, and the fountains broke often enough anyway, Ms. Fields and Mr. Elam decided to turn all of the fountains off. Ms. Fields also requested that the "blitz team" do the repairs suggested by the Health Department, including turning off the fountains and the sinks in the science laboratory (CX 279, CX 281, pp. 61-66).[38]

The Claimant was observed entering Farimount at about 7:25 a.m. on February 22, 1999, and going into the girls' bathroom. She did not report to the principal or sign in at the office, although the law requiring that visitors sign in is clearly posted at the entrance to the building (EX 19). The Claimant filed a complaint with MOSH, which responded on April 13, 1999. Ms. Kammerman of MOSH indicated that a senior industrial hygienist had reviewed the information she provided, and that an inspection had been done with the contractor at the site, which was closed in September 1998. Ms. Kammerman stated that no overexposure to lead was found at any time for the employees of the contractor, and lead abatement had been performed prior to the renovation work. She indicated that even if some lead particles were to become airborne, the possibility of overexposure to school employees was extremely low. Further, exposure to the children attending the daycare was not under their jurisdiction. The hygienist advised MOSH not to conduct an inspection at that time (CX 257). The Claimant took issue with these conclusions, and asked MOSH to reconsider (CX 258). In response, MOSH assigned the Claimant's complaint for investigation (CX 262).

In the meantime, the Claimant took her own water samples at Southeast in early January 1999. The Claimant has never precisely identified the water fountain where she got the samples, other than to say that it was in House 40, and that the faucet was in use. She sent them to an EPA certified laboratory, and received a report, dated January 29, 1999, showing that there were 18 parts lead per

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[37] According to Mr. Elam, this fountain, which is in House 40, was supposed to be shut off, and he could not explain why it was turned on (TR 670).

[38] The report prepared on February 11, 1999, indicated that a follow-up inspection would be performed one month later. At that time, testing of the fountain in House 40, outside the main office (which had been shut off) showed that there was 18.3 ppb in the first draw, and .5 ppb in the second draw (CX 281 [CEO 16]).

billion in the first draw sample, and less than 5 (or below the detection limit) on the post-flush sample (TR 429; CX 247). The report reflects that over 15 is considered hazardous.[39] The Claimant called Ms. Fields, and told her that she could prove there was lead in the drinking water. To the Claimant's amazement, Ms. Fields was not concerned, and did not seem to care. According to the Claimant, although she was being watched and monitored at her job, she felt morally responsible for the children, and felt obligated to inform the parents. She did not believe that the "higher powers" would be interested, and thus she did not approach anyone else in the school hierarchy (TR 436-440).[40]

Nor did the Claimant approach the School Improvement Team, a group of parents, teachers, and community organizations that meets regularly to discuss issues dealing with school improvement (CX 281, pp. 254-262). The Claimant testified at her dismissal hearing that she verbally expressed her concerns about the water at Southeast to the head of this team, who was a fellow teacher, and discussed the possibility that she could be on the agenda to speak at an upcoming meeting. Although the Claimant mentioned it again, she did not press the issue after that, as she did not want to be a nuisance. The Claimant testified that she saw this teacher almost daily, and figured that if she was ready for the Claimant to come forth, she would tell her so (CX 281, pp. 275-276).

Instead, without getting permission from Ms. Fields, she approached a clerical staff person at the school, whose name she could not recall, and asked for a copy of the parents' names and addresses (TR 441).[41] She then prepared approximately 500 copies of a letter, dated February 24, 1999, discussing lead in the water, which she mailed to the names on the list (CX 248). She also included her business card in each letter, according to her, in case any parents had questions.

The letter stated, *inter alia*,

> PLEASE BE ADVISED THAT your child's school has lead in the drinking water. The process for testing for lead in the drinking water was directed by an expert in lead abatement, who is certified and accredited by the Maryland Department of Environment, and who is also trained, certified, and accredited to sample water for lead contamination.

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[39] There is no evidence that the Claimant ever shared this report with anyone, other than to represent that the "expert" testing showed that there were 18 parts per billion in the water sample.

[40] Indeed, it appears that the Claimant did not share the results of her testing with anyone, including MOSH, the City Health Department, or the SIT team.

[41] At her dismissal hearing, the Claimant testified that she thought these names and addresses were accessible to the teacher at any time, and she did not see it as a violation. She did acknowledge that she did not ask Ms. Fields for permission, because she knew Ms. Fields would not give it, nor did she ask her supervisor, the head of the math department (CX 281, 264-265, 275).

> The lead level in the water is higher than what is acceptable by the Environmental Protection Agency.
>
> . . . . . .
> Your child needs to be tested to see if he/sshe [sic] has been potentially exposed to lead. Please, don't wait too long to have your child tested because the lead only stays in your child's blood stream for about 6 to 8 weeks.

Ms. Fields began receiving calls from parents on the morning of February 25. At the Claimant's dismissal hearing, she testified that the first call she received was from a parent who was very upset over the letter, which she had gotten in the mail. According to Ms. Fields, the parent did not believe that the school sent it, but wanted to know who did. The parent indicated that the letter included the Claimant's card. The parent was upset about the contents of the letter, as well as the fact that it did not come from the school (CX 281, pp. 51-52). According to Ms. Fields, the phone lines became so tied up with calls from concerned parents and the media that the area office was unable to get through, and had to use the telefax for emergencies (CX 281, pp. 53-54).

Ms. Fields held an emergency faculty meeting because, as she put it, the System had been plastered all over the evening news for two days. According to her testimony at the Claimant's dismissal hearing, the teachers were not concerned about the allegations in the letter, and indeed, no other teachers had made previous complaints about lead in the water. The teachers did complain about the fact that an emergency faculty meeting had been scheduled on Friday, requiring that observations be canceled. The teachers also complained that the letter had gone out without their knowledge, and asked if Ms. Fields had sent a rebuttal. She recalled that there was a question about whether the kitchen in the faculty room had ever been tested. Ms. Fields told the teachers that she would check; the teachers assured her that they did not drink from this facility, but just wanted to know (CX 281, pp. 378-380).

Dr. Abernethy immediately notified the CEO as well as the Labor Relations department of the letter sent by the Claimant. Dr. Abernethy reviewed the matter, to ensure that they had corroborating facts from the February 11 inspection by the Health Department, as well as the 1993 initial review of lead in all of the school system water, and checked with Mr. Elam. She then wrote a memo recommending that the Claimant be suspended without pay, to be reviewed by the CEO. Dr. Abernethy noted that the parents were unduly alarmed, that unauthorized access had been made to the files of all of the students in that school, and letters were sent to the children without permission. According to Dr. Abernethy, it was a serious disruption of the educational process. Dr. Abernethy noted that the Health Department's February 11 report found one faucet that had more lead than it

should, but that it had been labeled out of order, and had to be turned on to be tested.[42] There was no substantiation for a claim that there was lead in the water (CX 281, pp.19-21).

According to the Claimant, she was subsequently called to the office to take a call from Dr. Abernethy, who asked her if she had signed the letter. The Claimant would not answer the question, but told Dr. Abernethy that if she could prove it, the Claimant would "take the charge." The Claimant asked Dr. Abernethy if she had checked the validity of the claims she made in the letter, told her to have a nice day, and hung up on her (TR 446-450).

In a memorandum to Michael Maher, at the Office of Labor Relations, dated February 25, 1999, Dr. Abernathy noted that the Claimant had called the Health Department to come out and inspect the drinking fountains for lead. They did so on February 11, 1999, and their report showed low water pressure in some of the fountains, and faucet deterioration in others. Their recommendation was to turn off the one fountain outside the main office. However, as additional water stations had been added, and the fountains broke often anyway, the principal and Mr. Elam decided to turn all of the fountains off. Dr. Abernathy reported that Ms. Williams had sent a letter dated February 24, 1999 to parents about lead in the drinking water at Southeast. Dr. Abernathy felt that the conclusions and recommendations were erroneous, sensationalized, irresponsible, and caused untold and unnecessary alarm. She noted that the Claimant did not have permission to speak for the School System about its responsibility to the children, and in fact, when the schools were required to notify parents in 1992 and 1993 about testing, they did so. Dr. Abernathy reported her conversation with the Claimant, indicating that the Claimant did not deny that she had written the letter, although she stated that if they could identify her as the person who sent it, she would take the charge. Dr. Abernathy recommended that the CEO suspend the Claimant for misconduct in office (CX 279, CX 281, p. 18) .

The following day, Ms. Fields called the Claimant to the office; the vice principal was present as well. Ms. Fields told the Claimant that she had been getting many calls from parents and the media, and that it was causing a disruption in the school. During this meeting, the Claimant took notes, and interrupted frequently to ask the vice principal to confirm what was in her notes. He did not respond.[43] According to the Claimant, she told Ms. Fields that she did not have proper representation, and she wished to adjourn the meeting. Ms. Fields told the Claimant that she was suspended without pay, effective immediately, and that she would receive a certified letter to that effect. The Claimant testified that she went directly to the union representatives to tell them about the meeting (TR 449-450).

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[42] This appears to be the fountain in House 40, which was turned on by the Health Department for the follow-up testing in March 1999, and which produced results almost identical to those obtained by the Claimant.

[43] According to Ms. Fields, the vice principal's role was as a witness, and she instructed the Claimant that he would not participate in the meeting (CX 281, p. 77).

According to a memorandum from Ms. Fields to Dr. Abernathy, after she was informed that she was suspended, the Claimant stated that she did not hear anything that Ms. Fields said, and that she would be at school Monday morning. She then went to the foyer, where she was heard talking loudly about the "damn water." When she was asked not to use profanity, she denied doing so (CX 279).

The Claimant did not get a certified letter over the weekend. According to the Claimant, she came to school on Monday, where the union representative had told her to meet him. They sat in the office, where the Claimant was provided with the letter; she then went home (TR 453). In contrast, Ms. Fields' memorandum to Dr. Abernathy indicates that the Claimant sat in the office commenting to parents who came in about the lead in the water, and informing students who came into the office that Ms. Fields had fired her (CX 279). At the dismissal hearing, Ms. Fields testified that the Claimant came to school, and she asked her to wait in the inner office, but the Claimant insisted on waiting in the outer office, where she confronted parents who came in about lead in the water, and told students that Ms. Fields had fired her. Ms. Fields got a call from the union representative, who was waiting for the Claimant at the area office. He immediately came to the school, but the Claimant had left the office. He found her, they were provided with the letter of suspension, and they then left (CX 281, pp. 54-57).

This letter, from Robert Booker, the CEO of the Baltimore City Public School System, confirms that he approved Ms. Fields' recommendation of suspension without pay, finding the Claimant's actions to be disruptive to the education program (CX 250).

On February 26, 1999, Ms. Fields sent a letter to the parents, informing them that the information contained in the Claimant's letter was inaccurate. She did not identify the Claimant as the author of the letter, but explained the procedures and steps that had been undertaken at Southeast to ensure that it was safe. She noted that the entire school system had been tested in 1992-1993, and that Southeast had been identified as one of the schools with lead more than 20 parts per billion when the water was not flushed before drinking. Southeast, as well as all schools in Baltimore, complied with the EPA's requirements to flush and/or turn off water fountains. She noted that there had been bottled water available at Southeast, and that the fountains were flushed by the lead custodian. She also mentioned that at the latest testing by the Health Department, they recommended that a fountain outside the main office be turned off, due to faucet deterioration. She decided to turn off all faucets, and add more water stations. She stated that there was no danger to students or staff of exposure to lead in the water, and regretted any inconvenience or unnecessary alarm that resulted from the irresponsible actions of the person who wrote the letter.

On April 26, 1999, Dr. Patricia Abernethy recommended that the Claimant be dismissed for misconduct in office (CX 270). Both Dr. Abernathy and Ms. Fields testified at the Claimant's dismissal hearing that even if the allegations in the letter were true, they still would have recommended disciplinary action, because of the unnecessary disruption that had been caused, and because of the Claimant's use of what Dr. Abernathy characterized as "scare tactics." Ms. Fields felt that the Claimant's suspension and dismissal was justified on the basis of her unauthorized access of the student files, while Dr.

Abernathy indicated that the form of discipline may have been different if the allegations had any merit (CX 281, pp. 342-346; 383).[44] According to Dr. Abernathy, a teacher needs permission either from her or from the principal to have access to the school system's list of names and addresses, which is privileged information (CX 281, pp. 348-349).

Mr. Robert Booker recommended that the Board dismiss the Claimant for misconduct in office, citing her circulation of the letter on or about February 24, 1999, erroneously stating that the school's drinking water was lead contaminated (CX 270). The statement noted that parents and media contacted the school about their concerns, and that there had been an emergency staff meeting, in which the principal, Ms. Fields, advised the staff that the water was safe, and was not lead contaminated. The statement indicated that on February 26, 1999, Ms. Fields had asked the Claimant to attend a conference to discuss the letter, and to give her an opportunity to explain her role regarding the letter. At that conference, Ms. Fields advised the Claimant that she intended to recommend that the Claimant be suspended without pay. On March 1, 1999, Dr. Booker indicated to the Claimant that he had accepted this recommendation, and that the Claimant was on emergency suspension without pay, pending further disciplinary action.

The Statement reflected that since she was employed by the Baltimore City Public School System, the Claimant had engaged in similar conduct that caused some level of disruption in the System. Specifically, the Statement noted that on December 3, 1996, the Claimant wrote a letter to the mayor, claiming that staff and students at Farimount had been exposed to lead as a result of a renovation project at the school. Copies were given to staff, students, and Farimount parents. The Claimant referred to herself as a lead abatement expert, and discounted the results of the November 1996 study by Johns Hopkins University, which specifically found that the project had not exposed the staff and students to unsafe amounts of lead.

Additionally, the Statement noted the preparation and distribution of a letter by the Claimant, claiming that an expert had cited three System schools as lead based paint and asbestos hazards, and identifying the Claimant as a lead expert. The letter was given to staff, students, and parents, and caused a panic among the parents of students at one of the schools, James Mosher Elementary. The principal contacted the Department of Facilities to confirm the accuracy of the letter, and was advised that the Department was not aware of any citations issued against the school for lead paint and asbestos, and confirmed that all System schools had been inspected for such hazards in accordance

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[44] Ms. Fields noted that at the time of the February 1999 incident, she had only requested that the Claimant be put on suspension, not dismissed, until she could investigate. She stated that when the Claimant was informed that she was suspended, she stood in the hallway erroneously claiming that she was fired, and threw what Ms. Fields called a "hissy fit," referring to the "damn water," while students and parents were leaving the building at dismissal. She felt that the Claimant had not set a professional example (CX 281, 384).

with the law.

A hearing was held on August 26, 1999, before a hearing examiner for the Baltimore City Board of School Commissioners (CX 281). The hearing officer subsequently determined that there was merit to the Claimant's allegations, and recommended that the CEO's recommendation of dismissal be denied by the Board (CX 139). However, the Board did not accept the hearing officer's conclusions.

Mr. Booker took exception to the conclusions of the hearing examiner, noting that the testimony of the witnesses established that the recommendation to dismiss the Claimant was based on, *inter alia*, the Claimant's inappropriate conduct with respect to her unauthorized dissemination of information directly to the public and media (CX 276). Mr. Booker argued that while the hearing examiner was correct in concluding that the Claimant had the right to file a complaint with MOSH about safety and health issues that affect the public, he erred in failing to find that her unauthorized access to confidential student records for personal and perhaps professional gain rose to the level of misconduct in office. He noted that the Claimant acknowledged that she did not obtain permission to access the addresses, or to mail the notice. He stated:

> These addresses constitute confidential student information that the Respondent would not otherwise have had access to as private citizen. Indeed, by attaching a business card to the notice identifying herself as a lead abatement expert, it can reasonably be argued that Respondent was actually soliciting the parents for business. . . . Further, Respondent's admission that she did not bring her concerns to the attention of her superior shows a total disregard for the chain of command. Her actions created a conflict or appearance of conflict between the interest of the BCPSS and that of her own.

Mr. Booker argued that the Claimant's actions bore on her fitness to teach, and that the record supported a finding that her repeated pattern of inappropriate behavior incited panic and disruption in the System, citing to the three separate occasions when the Claimant disseminated information to parents, students, and staff concerning health and safety issues at the schools. He claimed that the Claimant's failure to follow the chain of command when addressing safety issues had caused the community to lose confidence in the Board's ability to protect the health and safety of the children in its charge, and that the integrity of the system had been seriously compromised by her actions.

By letter dated December 8, 1999, Ms. Donaldson advised the Claimant that the Board of School Commissioners, by majority vote, rejected the hearing officer's recommendation, and upheld the dismissal decision of the Chief Executive Officer. Ms. Donaldson noted that her case would be on the Board's December 14, 1999 public business meeting for final action, and that after that, she would receive the Board's final order (CX 280). By this Order, the Board found that the Claimant committed misconduct in office by failing to follow the chain of command when she disseminated information about alleged potential health hazards at three System schools. Additionally, the Board also found that she

did not have permission to obtain the home addresses of the approximately 500 students at Southeast, and that this confidential student information was wrongfully acquired to further the Claimant's personal goals and objectives. The Board concluded that the Claimant violated the Ethics Laws and Codes of Conduct of Baltimore City in attaching her personal business card to this communication. The Board disagreed with the hearing examiner's conclusions, and found that the Claimant's repeated failure to follow proper procedure when addressing alleged health and safety concerns had a direct bearing on her fitness to teach, such that it would undermine her future classroom performance and overall impact on students (RX 21).

The Claimant testified that after she was fired from the School System, she taught at her son's school for about two months in the spring of 1999 (TR 534). She has worked as a volunteer teacher there a few times since then (TR 535). According to the Claimant, she has not had time to look for another teaching job, as she spends much of her time in the library in connection with her various litigations. She receives unemployment compensation benefits (TR 536-537). According to the Claimant, she is aware that she is required to actively seek employment, but she has explained to the people at the unemployment compensation office that she is trying to clear her reputation before looking for another job (TR 538).

The Claimant acknowledged that her doctor has diagnosed her with depression and stress, and suggested medication. She is angry at the "system," and suspicious that MOSH has been concealing the facts; she will not take medication, but prefers to rely on her faith (TR 541-550).

Dr. Stephen W. Siebert performed a psychiatric evaluation of the Claimant on October 16, 1997, in connection with her workers compensation claim. He reviewed the results of the lead testing performed on the students and staff in November 1996; Dr. Peck's psychiatric evaluation of December 23, 1996; and the Claimant's workers' compensation claim. Dr. Siebert noted that Dr. Peck diagnosed the Claimant with major depression, but that the Claimant disagreed, as she felt she suffered from major stress. He also referred to the results of her November 8, 1996 blood test by Dr. Jacobs, which was essentially negative, although she reported to the media that the test showed lead in her system. According to Dr. Siebert, the Claimant understood that this result was negative, but nevertheless she was concerned about her past exposure to lead. Dr. Siebert reported that the Claimant had been scheduled for evaluation in April, July, and August of 1997, but that she did not appear. She told him that she was protesting a psychiatric evaluation until she had a "six part examination according to OSHA guidelines." Among other conclusions, Dr. Siebert noted that the Claimant was preoccupied to an extreme degree with environmental hazards, but that it was unclear to what extent her concerns were valid, versus obsessions, phobic anxiety, or delusions. He noted that some of her allegations seemed highly implausible, and that her concerns or ideas might not be reality based. He noted her somewhat paranoid stance, and her belief that there was a coverup involving many people. He felt that the Claimant was not persuaded by evidence to the contrary, but rationalized facts to her own beliefs. For example, even though she had a negative serum lead test, she nevertheless continued to believe that she was exposed nine years earlier, and dismissed any reports or studies done

by the school, claiming they were biased or fraudulent. Dr. Siebert felt that the Claimant had a delusional disorder with persecutory ideas and querulous paranoia. He found no evidence that she suffered an accidental injury on September 19, 1996, noting that she continued to work until early November, when her main complaint was the low temperature in the building. In his opinion, none of these anxieties or fears were sufficient to result in an acute stress or posttraumatic stress disorder. Further, he found no evidence that the Claimant had any symptoms of major depression. He felt that she had either a delusional or personality disorder representing a preexisting condition, not causally related to any accidental injury (CX 137).

DISCUSSION

Alleged Protected Activity

The Claimant alleges that she was unlawfully terminated on December 8, 1999, due to her involvement in a lengthy course of protected activities relating to her complaints and attempts to expose lead and asbestos hazards at several System schools.

Claimant's Prayer for Relief

The Claimant seeks a variety of remedies in this claim. First, she seeks an order compelling the System to take a number of steps that, in her view, would ensure that the risk of exposure to lead or asbestos in the schools would be eliminated. The Acts under which this claim is brought do not provide the authority for the issuance of such an order.

The Claimant also seeks compensatory damages in the amount of approximately $70,000, comprising back pay and interest, insurance benefits, medical expenses, and other expenses, as well as punitive damages in the amount of $78,000,000.

The Applicable Law

The Claimant in a whistleblower case initially has the burden of proving a *prima facie* case by a preponderance of the evidence. To prove a *prima facie* case, an employee must establish each of the following elements:

1) That the employee engaged in protected activity;

2) That the employer knew that the employee engaged in protected activity;

3) That the employer took some adverse action against the employee; and

4) The employee must present evidence sufficient to at least raise an inference that the

protected activity was the likely reason for the adverse action.

Scerbo v. Consolidated Edison Co. of New York, Inc., 89 CAA-2 (Sec'y Nov. 13, 1992). Once the Claimant has established her *prima facie* case, the Respondent has the burden of presenting evidence that the alleged adverse action was motivated by legitimate, nondiscriminatory reasons. If the Respondent articulates a legitimate, nondiscriminatory reason for its action, the Claimant must establish that the Respondent's proffered reason was not its true reason, but was a pretext. The ultimate burden of persuasion of the existence of intentional discrimination rests with the employee. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981).

The Respondent need not persuade the Court that it was actually motivated by the proffered reasons, but it is sufficient if the Respondent's evidence raises a genuine issue of fact as to whether it discriminated against the Claimant. To accomplish this, the Respondent must clearly set forth, through the introduction of evidence, the reasons for the Claimant's dismissal.

Protected Activity

To establish the first element of the Claimant's *prima facie* case, she must prove that she engaged in protected activity. The Secretary has broadly defined protected activity as the report of an act which the complainant reasonably believes is a violation of the environmental acts. The Secretary has also stated that a complainant under an employee protection provision need not prove an actual violation of the underlying statute. *See Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992). Rather, an employee's complaint must be "grounded in conditions constituting reasonably perceived violations" of the environmental acts. *Johnson v. Old Dominion Security*, 86- CAA-3 to 5 (Sec'y May 29, 1991), slip op. at 15; *Crosier v. Westinghouse Hanford Co.*, 92-CAA-3 (Sec'y Jan. 12, 1994).

The issue of the reasonableness of a claimant's perception of environmental violations has been discussed in the context of a refusal to report to work until the perceived hazard has been addressed. Thus, in *Sutherland v. Spray Systems Environmental*, 95-CAA-1 (Sec'y Feb. 26, 1996), the Secretary, citing, *inter alia, Pensyl v. Catalytic, Inc.*, 83-ERA- 2 (Sec'y Jan. 13, 1984), noted that a work refusal loses protection under the CAA and the TSCA after the perceived hazard has been investigated by responsible management officials, and if found safe, adequately explained to the employee. "Management has the prerogative to determine which means it deems to be most effective provided such means comport with requisite safety and health standards. There is no requirement for management to engage in a dialog with the refusing workers as to which procedure would be most efficacious." Slip op. At 5-6.

In *Stockdill v. Catalytic Industrial Maintenance Company, Inc*., 90-ERA-43 (Sec'y Jan. 24, 1996), the Secretary agreed with the ALJ's conclusion that the Complainant's initial concerns about wearing a dust mask lost their protection after the Respondent adequately responded to the

Complainant's concerns. The ALJ found that the Respondent in fact went to significant lengths to investigate and explain the safety of the work area, and gave the Complainant opportunities to change his mind about the work refusal.

In the context of this particular case, it is analytically useful to address the character of the Claimant's diverse activities and to determine if she has in fact established a *prima facie* case. While I find that many of the Claimant's activities fall squarely within the definition of protected activity under the various statutes applicable to this case, I also find that not all of those activities so qualify. Thus, the Claimant's complaints to various regulatory groups, as well as her public airing of her concerns about the potential safety hazards presented by the renovation project occurring at Farimount, were clearly protected activity within the meaning of the applicable statutes. In response to these concerns, which appear to have been shared, at least initially, by other teachers and staff at the school, the System undertook significant activity to ensure that the environment was safe, that any potential problems were corrected, and that a plan was in place to monitor the safety of the occupants during the renovation. Thus, the System engaged an environmental contractor to clean the building after activity by the general contractor apparently impacted some lead and asbestos surfaces, with clearance and monitoring by the appropriate regulatory agencies. The System also engaged an environmental contractor to perform ongoing asbestos abatement under applicable protocols, to identify areas affected by the renovation, remove the occupants, perform the abatement under containment, and take clearance samples before reoccupancy. To allay concerns of the teachers and parents, the System offered blood testing, which did not show any link between exposure at the school and elevated blood levels. The school was inspected numerous times, by MOSH, and by the City Health Department; no one found any violations.

In her subsequent complaints and allegations, as well as at the hearing, the Claimant ignored the fact that this cleaning had taken place, and that clearance testing had been done before each cleaned area was released for occupancy. Instead, she focused on the fact that only 45 lead dust samples were taken, which in her "expert" opinion was an insufficient number of samples. Of course, as Mr. Elam pointed out, as the System had elected to clean the entire building, it did not make sense to spend time or money taking additional samples. The Claimant has presented no credible evidence that the cleaning was done improperly, or that hazards remained afterward. Indeed, in response to her complaint, an inspector from MOSH conducted an inspection, finding nothing to substantiate the Claimant's many complaints, including raw sewage in the drinking fountains. MOSH did note chipping and peeling paint in hallways where dropped ceilings had been removed, and in some of the classrooms. However, as part of the renovation project, the school was to be repainted, and in fact the System contacted a lead removal contractor, and asked the Maryland Department of Environment for surveillance during this process. The MOSH inspectors noted no violations, and recommended no citations.

In addition, while the renovation project was ongoing, there was an asbestos abatement project

at Farimount, to identify areas that would be affected by the renovation, remove the occupants, perform the abatement under containment, and take clearance samples before reoccupancy.

Finally, at least in part due to the concerns raised by the Claimant, the System conducted sampling of blood for elevated lead levels, under the auspices of Johns Hopkins. This was made available to all students and staff, and the results did not show any link between exposure at the school and elevated blood lead levels. Teachers and staff were informed of the results of the lead dust wipe analysis, as well as the blood sampling analysis. Indeed, these reports received extensive coverage on local news broadcasts.

For whatever reasons, the Claimant refused to accept the validity of any report or study that contradicted her opinions. She did not participate in the study by Johns Hopkins, although she had her blood tested by her private physician. Despite the fact that this test, as well as a second one performed the next year, showed that her blood level was normal, she continued to represent that she had lead in her system.[45] She interpreted the results of the wipe sampling analysis as showing that there was enough lead dust to poison everyone in the building. When MOSH determined that the City had followed appropriate regulatory guidelines, she interpreted those results as confirmation that there was asbestos and lead at Farimount. Again, when Dr. Amfrey responded to Ruth Ann Norton, explaining that the appropriate state and local regulatory agencies had determined that the school was safe for continued occupancy, and noting that the System was conducting a thorough cleaning as a precaution, and screening students and staff, and had developed protocols for impacting lead paint surfaces, the Claimant interpreted his letter as confirmation that the renovation project created a lead based paint hazard.

The Claimant did not report for work during most of the 1996-1997 school year. However, she did continue to agitate, writing repeatedly to the Mayor, videotaping the school as well as interviews with students, and testifying at a city council meeting. The media again publicized her allegations, but again, when the council concluded that there was not a problem, she was astounded. Nor could she believe that the Baltimore City Health Department, which inspected the building at that time, found no evidence of environmental violations. Indeed, despite all of these findings, she contacted parents and conducted meetings, and appeared on public television, alleging that the building was unsafe.

Similarly, at James Mosher, in response to the Claimant's complaints, an inspection was

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[45] She also stated in her Incident Report, regarding the alleged incident of November 7, 1996, that she had lead deposits in her bones and parts of her body, an allegation for which there is no support in the record.

conducted by MOSH, but again, no environmental hazards were identified. At Highlandtown, in response to the Claimant's complaint, MOSH again inspected, but found no environmental violations, despite the Claimant's unsupported claim that there was documentation of elevated blood levels in persons at James Mosher. At Southeast, the Claimant's complaint about the safety of the drinking water was addressed by testing, which showed problems only at one fountain, which was supposed to be turned off, and again, steps were taken to ensure that any potential hazards were avoided, by turning off all drinking fountains, and providing additional sources of drinking water for the occupants.

Indeed, it is safe to say that, in large part due to the Claimant's activity, important steps were taken by the System to ensure the safety of students and staff in these school buildings. But at some point her activities lost their character as protected activity. *See, e.g., Mosbaugh v. Georgia Power Co.*, 91 ERA 1 & 11 (ALJ Oct. 30, 1992), where the ALJ found that even if the Claimant's hundreds of hours of covert tape recording was protected at the outset, its continuation and scope because so egregious and potentially disruptive to the workplace that it lost any protected status that it once may have possessed.

Once the concerns raised by the Claimant were addressed, it was no longer reasonable for her to continue claiming that these schools were unsafe. It appears that the Claimant was unwilling to accept the conclusions of the numerous agencies who investigated her complaints, and determined that they were unfounded. Indeed, the Claimant suggested throughout her testimony, and in the fliers she circulated to parents, that there was a coverup by public officials, who did not want to reveal the "truth." She was suspicious of MOSH; she felt that the Mayor was not doing his job. She discounted the reports by the experts whose job and profession was to assess environmental and safety risks, and instead relied on her status as an "expert," by virtue of her attendance and certification for assessing environmental risks. But although she assailed the results of various tests as misleading and unreliable, she offered no support or documentation for her bald allegations, other than her surreptitious videotapes.

Clearly, by December 1996, it was no longer reasonable for the Claimant to continue to allege that the conditions at Farimount were unsafe. By that time, the testing and cleanup had occurred, a lead abatement contractor and asbestos contractor were engaged on an ongoing basis, and the staff and students had been screened for elevated lead levels. MOSH had investigated the Claimant's complaints, and found that the building was safe for occupancy.

The Claimant based her allegations of lead problems at Highlandtown, by her own account, on a rumor from a parent, as well as her own surreptitious videotaping of the inside of the school, and her knowledge that the school was old, and therefore had lead based paint. However, once MOSH investigated her complaints and determined that there was no lead based paint hazard, there was no

reasonable basis for her continued allegations. Again, she has never put forth any basis for her claim that this investigation was unreliable.

With respect to James Mosher, again, the MOSH inspectors performed an inspection in response to her complaint, issuing no citations for lead based paint or asbestos hazards, but making safety recommendations for workers. Once this determination was made, there was no reasonable basis for the Claimant's continued allegations about James Mosher, nor has the Claimant, despite her "expertise," ever put forth any facts to support these allegations.

At Southeast, again in response to rumors, the Claimant made a complaint to the Health Department about lead in the water. The Health Department responded promptly, making recommendations to turn off a fountain and add additional bottled water stations, but not citing the school for any lead problems. In response, the school system shut all of the fountains. The Claimant did not accept the results of this inspection, however, but relied on her own "expert" testing of the water from the fountain outside the main office.[46] In fact, the results of her testing showed that although the lead level was high on the first sample, after flushing, it was at acceptable levels. But even if there were problems with the lead level in this fountain, they were addressed by turning it off, along with all of the other fountains. There could not be a potential for lead exposure if the water was not available to the students. Nevertheless, the Claimant circulated a letter to 500 parents, telling them that there was lead in their child's drinking water at school, and referring to the results of her testing, giving the impression that all of the water fountains had been tested as part of an official process, which found dangerous levels of lead in the water, when in fact it was the Claimant who was the "expert," and who had sampled one fountain. Furthermore, her statement that there was lead in the drinking water was simply erroneous, as all of the fountains had been turned off, and the students and staff were using bottled water. There was no reasonable basis for the Claimant's allegations.

Viewing the record as a whole, it is fair to say that the Claimant has demonstrated a tendency to interpret facts in a way that suits her purposes. In other words, many of her claims are replete with half-truths and outright misrepresentations. Thus, she told Ms. White, and went on the air to publicly claim that her blood tests had shown lead in her system, implying that she had been poisoned by her exposure to the school, when in fact she had not received the results of her blood test at the time, which

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[46] This may be the same fountain that both Mrs. Fields and Mr. Elam testified was supposed to be turned off as a result of the 1992-1993 study. Mr. Elam testified that it was unaccountably on when the Health Department checked in February 1999; apparently, it was shut off again at that time, and turned on for testing by the Health Department in March 1999. The testing results obtained by the Claimant were almost identical to the results obtained by the Health Department on this fountain, both before and after flushing, suggesting that it is the same fountain.

in any event turned out to be normal. Indeed, when she finally returned to school in March 1997 and completed an incident report, she claimed that she had been out sick because she was exposed to lead, but in the next breath, when offered the chance to be tested, she claimed that her lead level was low, due to her health habits. Apparently she did not wish to share the results of either of her blood tests, which were normal.

In the spring of 1997, after the uproar of the previous fall had apparently died down, the Claimant again went public, taking her surreptitious videotape to the city council meeting, and handing out the paint and dust sampling report that had been provided to the teachers in November 1996. She did not mention that since that report, the school had been thoroughly cleaned, and in response to a direct question from Councilman Kane, she replied that she did not know if any cleaning had taken place. Of course, this was not true: the record reflects that she, as well as the other teachers and staff, and indeed the public, by virtue of the news reports videotaped by the Claimant, knew that the cleaning had taken place, and that the System had taken significant steps to address the concerns raised by the report.

Very telling is the videotape that the Claimant made at Farimount in the spring of 1997. Although the videotape indeed shows rundown conditions, it is not clear whether the areas that appear on the tape were occupied, or in the process of renovation. Nor is it possible to tell from the videotape whether these conditions presented environmental hazards, in the form of lead or asbestos dust. The Claimant's "interviews" of the students are self-serving and clearly coached by the Claimant. There is no documentation whatsoever in the record that Ms.Tiffany Burgess had elevated lead levels, or if she did, that they were due to conditions in the school. The allegation that she received a $500 bribe as "hush money" is patently ridiculous, especially in light of the fact that the existence of lead paint and asbestos at the school was never kept secret, and the System candidly shared that information, as well as the steps that were taken to address any potential dangers, with staff and students. The Claimant's manipulation of these students was disgraceful and borders on scandalous.

It is worth noting that for the last three school years that she was employed by the Baltimore City Public School System, the Claimant had serious attendance problems. Indeed, she was absent for most of the 1996-1997 school year, and her attendance problems had become serious during the 1998-1999 school year. Coincidentally, the Claimant took her water samples at a time when Ms. Fields was attempting, unsuccessfully, to get the Claimant to meet with her to discuss her attendance problems.[47] Again coincidentally, the Claimant had such a meeting scheduled two days after she sent

[47] The Claimant explained that, although she was aware of rumors of lead in the water at Southeast from the time she started working there, she kept quiet because she did not want to cause problems or be a nuisance. She apparently did not recognize similar constraints about her activities in

out her letter. A reasonable inference to be drawn is that the Claimant's activities were motivated in substantial part by her hope that she could avoid disciplinary action by virtue of her status as a whistleblower. Of course, protected activity does not lose its character as protected activity merely because a person has dual motives for his or her protected activity. But in this instance, given that the Claimant had longstanding and serious attendance problems, and the fact that there was no factual basis for her continued allegations, her apparent attempt to use the cloak of whistleblower to avoid disciplinary action sheds light on the reasonableness of her beliefs, and therefore the protected status of her activities.

It is also worth noting that although the Claimant apparently went out of her way to agitate about conditions at several public schools, sometimes on the basis of nothing but rumors, she never raised a question about the safety of her own son's school, where she taught for several months in 1999. Indeed, she testified that she although she offered her services as an expert free of charge, she never actually assessed whether there were any hazards at the school (TR 536-539). This strongly suggests that her activities were motivated, not so much by her concern for children, but by her desire to avoid disciplinary action.

Whether the Claimant's activities stemmed from a psychiatric disorder, manifested by her obsession and refusal to accept any conclusions contrary to her own beliefs, as suggested by Dr. Siebert, or from a desire to avoid disciplinary action, cannot be established with certainty, nor need it be. Regardless of her motivation, by February 1999, when she mailed her letter to the parents, her allegations were not grounded in conditions that constituted reasonably perceived violations of the environmental statutes. Thus, I find that the mailing of this letter was not protected activity, nor was the distribution of the fliers on the two previous occasions.

Adverse Action

To establish the third element of her *prima facie* case, the Claimant must prove that the Respondent took some adverse action against her.[48] In this case, the Claimant alleges that the adverse action was her dismissal. As it is a step in the dismissal process, I also consider the Claimant's claim to include her suspension without pay. I find that the Claimant has established that the Respondent took adverse action against her by virtue of these acts. However, the Claimant must also at least raise an

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connection with Fairmount, Highlandtown, and James Mosher, which occurred while she was working at Southeast.

[48] The record clearly establishes that the System was aware of the Claimant's media, letter writing, and flier campaign.

inference that protected activity was the likely reason for the adverse action.

With respect to her suspension without pay, effective March 1, 1999, it is clear that the precipitating cause of that action was the letter that the Claimant mailed out to parents about lead in the water at Southeast. The testimony and the internal memoranda in the record amply demonstrate that the Claimant's immediate supervisor, Ms. Fields, as well as higher authorities in the system, such as Ms. Wighton, were aware of the Claimant's various activities in connection with possible health hazards at the schools. Again, it is also clear that the System responded appropriately to all of the inspections and inquiries generated by the Claimant. But over the three years that the Claimant engaged in her various activities, there was no disciplinary action taken against her, as the Claimant agrees in her posthearing brief. In fact, she received a favorable evaluation for the 1998-1999 school year. I have found that the Claimant's mailing of the February 24, 1999 letter was not protected activity, and thus the Claimant has not raised an inference that protected activity was the likely reason for her suspension.

Similarly, the Statement of Charges presented to the Board by Robert Booker, the Chief Executive Officer, in support of the recommendation of dismissal, refers to her circulation of the February 24, 1999 letter, as well as her circulation of her December 3, 1996 letter to the Mayor regarding exposure to lead at Farimount, and her circulation of her letter citing Farimount, James Mosher, and Highlandtown as lead based paint and asbestos hazards, pointing out that the information in those letters was unfounded, and caused disruption in the System. I find that these activities, which occurred after the Claimant's complaints had been addressed and resolved, were not protected within the meaning of the environmental statutes, as they were not based on a reasonable perception of an environmental hazard.

But even if the Claimant's activities in these instances were found to be protected activity, resulting in adverse action by the Respondent, I find that the record clearly establishes that the Respondent had a legitimate and nondiscriminatory reason for its actions in suspending the Claimant, and then dismissing her.

In this case, the Claimant alleges that it was her ongoing course of conduct, involving the filing of numerous complaints with the Maryland Occupational Safety and Health Administration, and the City Health Department, and her attempts to publicize what she perceived as health and safety problems as well as a coverup by the school system, that spurred the System to terminate her in December 1999. The facts, however, overwhelmingly establish otherwise.

Thus, the record reflects that between late August 1996 and her dismissal in December 1999, the Claimant engaged in an extensive series of activities that she felt were necessary to address her perceived health and safety concerns at several Baltimore City Public Schools. She filed numerous

complaints with MOSH alleging lead dust and asbestos hazards at Farimount, Southeast, Highlandtown, and James Mosher. On numerous occasions, she contacted the media, both print and broadcast, to air her environmental concerns and allegations. She complained persistently to public officials, including the Mayor and the Health Department Inspector. She notified parents of her allegations, distributed fliers, called meetings, and picketed. She testified at a public hearing on lead paint poisoning. It is clear from the record that her supervisors were aware of her activities.

The record also overwhelmingly demonstrates that the Claimant did not suffer any adverse action as a result of these activities. In fact, it appears that the System took the allegations seriously, and undertook to investigate, and if necessary, take corrective action. Thus, when the Claimant, along with other staff at Farimount, expressed concerns about possible lead dust exposure at Farimount, the System hired a contractor to collect lead dust samples at the school for analysis. An earlier System wide study performed in 1992 and 1993 had shown that there was lead paint in the walls, but no lead dust. When the results of this testing showed elevated lead levels in six of the forty five samples collected, possibly as the result of the renovation activity impacting the lead paint surfaces, the System engaged an environmental contractor to clean the entire building.

Despite the failure of the Claimant to report for work for most of the school year, and her diverse and well-publicized activities alleging environmental hazards at the school, the record does not reflect that any adverse action was taken by the System against the Claimant during this school year. In fact, the only action that was even close to a reprimand was the notice from Ms. White, instructing her not to videotape inside the school building. Nor does the record reflect any adverse action against the Claimant up to February 1999, despite her continued and well-publicized activities with respect to James Mosher, Highlandtown, and Fairmount.

With respect to the March 1, 1999 suspension, I find that the Respondent has clearly established that this action was motivated by legitimate and nondiscriminatory reasons. By that time, the Claimant had been agitating in connection with alleged health and safety hazards for over two years. Yet there is no evidence that she ever suffered any recrimination from the System as a result of her activity, despite the fact that it caused some disruption for the schools involved, and resulted in much media publicity that was clearly not favorable to the Respondent. In fact, the System did respond, by addressing those problems uncovered as a result of the Claimant's complaints. Indeed, despite the fact that by February 1999, her attendance and tardiness problems had become severe, there is no evidence that she was subjected to disciplinary action on any grounds.

Ms. Fields testified that her recommendation of suspension without pay was based on the fact that the Claimant had obtained the names and addresses of parents without authorization, and had sent out information that was untrue and unnecessarily alarming to those parents. In fact, at that time Ms.

Fields had in her hands the report from the City Health Department, finding that there were no problems with lead in the water. According to Ms. Fields, the responses generated by the Claimant's false and sensational letter caused a serious disruption in the functioning of the office, and required the scheduling of emergency meetings to address the situation, and the attention generated by the media. Ms. Fields testified that, even if the Claimant's allegations had some merit, she still would have recommended her suspension for obtaining unauthorized access to the list of names and addresses. Ms. Wighton also confirmed that, even if there were merit to the Claimant's claims, she still would have recommended some form of discipline, although the form of that discipline may have been different. However, as the System had just completed an inspection by the City Health Department, based on the Claimant's complaint, it was clear that her claims were baseless.

With respect to the Claimant's dismissal, the Statement of Charges identifies three activities as the basis for the charge of misconduct: the circulation of the February 24, 1999 letter, the circulation of the December 3, 1996 letter to the Mayor about lead exposure at Fairmount, and the circulation of the letter (in the spring of 1997) about Fairmount, James Mosher, and Highlandtown. The identified misconduct does not include the Claimant's complaints to MOSH or the City Health Department, or her publicized allegations on television or at the City Council meeting. Rather, it is limited to that conduct on the part of the Claimant that caused disruption in the school system, by unnecessarily alarming parents and diverting school resources to respond to inquiries, when in fact the System had adequately responded to the concerns raised by the Claimant.

The Secretary has set the standard for indefensible behavior fairly high, noting that the right of the employer to maintain shop discipline must be balanced against the heavily protected rights of employees under the whistleblower statutes, and that to fall outside the statutory protection, an employee's conduct must be indefensible under the circumstances. *Carter v. Electrical District No. 2 of Pinal*, 92 TSC 11 (Sec'y July 26, 1995). However, the Secretary has also noted:

> That employees are protected while presenting safety complaints does not give them *carte blanche* in choosing the time, place and/or method of making those complaints. . . . Nor is an otherwise protected employee automatically absolved from abusing his status and overstepping the defensible bounds of conduct – even when provoked. . . . Furthermore, certain forms of "opposition" conduct, including illegal acts or unreasonably hostile or aggressive conduct, may provide a legitimate, independent, and nondiscriminatory basis for adverse action. . . .

Garn v. Toledo Edison Co., 88 ERA 21 (Sec'y May 18, 1995). In making his decision, the Secretary relied on the decision of the Seventh Circuit Court of Appeals in *NLRB v. Truck Drivers, Oil Drivers, Filling Station and Platform Workers Union, Local 705*, 630 F.2d 505 (1980), in which the Court found that the employees' dismissal did not violate their right to engage in protected

activity. The employees were discharged after complaining about their salaries during a union steward meeting, using the union's CB radios to discuss their complaints, and distributing letters concerning their wage demands to union executives who were attending a political luncheon. The Court found that the employees' failure to follow procedure, coupled with their poor work performance, and prior warnings concerning their performance, justified their dismissal. The Court noted:

> [a]n employer should not be penalized for good-heartedness with employees who choose to flout its rules and ignore its warnings. . . . There must be room in the law for a right of an employer somewhere, some time, at some stage, to free itself of continuing, unproductive, internal, and improper harassment.

Id. at 508.

Here, the Claimant clearly was entitled to make health and safety complaints, which she did, repeatedly, with no evidence that the System ever retaliated against her. However, her persistent unfounded and sensationalized claims, which she circulated directly to parents, clearly overstepped the bounds of defensible conduct. It is abundantly clear that the Claimant was suspended, and later discharged, because of her disruptive conduct in circulating false and inflammatory fliers to parents, not once, but three separate times.

It is unclear why the System did not address the earlier incidents at the time they occurred, with some form of discipline. Apparently, the System "went along" after the Claimant's unfounded agitation on the first occasion she distributed fliers to the parents. The System "went along" after the second incident, even though once again there was no basis for the Claimant's sensational claims, and the Claimant by that time was a serious attendance problem. It appears that the incident in February 1999 was the final straw. But as the Seventh Circuit Court of Appeals noted, an employer should not be penalized for good-heartedness with employees who choose to flout its rules and ignore its warnings. *Truck Drivers, supra,* at 509. The System has a legitimate interest in maintaining an orderly environment for the education of the children in its charge, and in maintaining a level of trust with the parents of those children. That the Claimant has a right to raise health and safety concerns does not automatically entitle her to override these interests. The System is entitled to have its employees, and especially its teachers, act in a professional manner that fosters such an orderly environment and level of trust. There is ample room for employees of the System to raise health and safety concerns, as the Claimant did, within these bounds. However, the Claimant's repeated, unfounded, and sensationalized missives to parents overstepped these bounds, and especially in light of the fact that her concerns had been addressed and responded to by every health and safety organization responsible for overseeing those concerns, her actions were manifestly indefensible. I find that the reasons articulated in the Statement of Charges are legitimate and nondiscriminatory.

Even if they were not, the Claimant has not established that the reasons proffered for both her suspension and her dismissal, that is, her unauthorized use of the list of names and addresses, and her disruption of the System by circulation of unfounded allegations, were not its true reason, but were a pretext. The continuing theme of the Claimant's testimony and evidence is that the System (as well as MOSH, the Mayor, the City Council, and the City Health Department) wants to keep her from exposing the "truth," and that the System fired her because she has tried to expose this "truth." Of course, if the System really wanted to silence or retaliate against the Claimant, it would have done so in the fall of 1996, when, largely due to her agitation, the System received a great deal of unfavorable publicity. They did not do so, but kept her on as a teacher for over two more years, despite the fact that she was on "sick leave" for much of that time, and was a serious attendance problem otherwise. It was not unreasonable, unfair, or discriminatory for the System to fire the Claimant, not for making complaints about environmental hazards, but for circulating unfounded, misleading, and alarming missives directly to parents, when her allegations had been addressed and discounted by the public agencies responsible for monitoring them. Frankly, it is somewhat disturbing that the System did not address the two earlier incidents; perhaps the circulation of the February 1999 letter was simply the straw that broke the camel's back. In any event, I find that the Respondent has set forth legitimate and nondiscriminatory reasons for the Claimant's suspension and dismissal, and that the Claimant has not established that these reasons were a pretext.

CONCLUSION

I have carefully reviewed all of the evidence of record in this case, and I find that the Complainant has not proven that the Respondent was motivated in whole or in part by any protected activity on the Claimant's part when it suspended, and then dismissed the Complainant from her job as a teacher in the Baltimore City Public School System.

RECOMMENDED ORDER

It is recommended that the complaint of Diana R. Williams against the Baltimore City Public School System under the Comprehensive Environmental Response, Compensation, and Liability Act, the Federal Water Pollution Control Act, the Safe Drinking Water Act, the Solid Waste Disposal Act, and the Toxic Substances Control Act be dismissed.

Linda S. Chapman
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §§24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. 29 C.F.R. §§§§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).